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IN THE
SUPREME COURT OF THE UNITED STATES

Gail Atwater, and Michael Haas as next friend of Anya Savannah Haas and Mackinley Xavier Haas,
Petitioners,

v.

City of Lago Vista, Bart Turek, and Frank Miller,
Respondents.

On Petition For Writ Of Certiorari To The United States Court of Appeals For The Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Petitioner Gail Atwater was placed under custodial arrest for not wearing a seat belt, a misdemeanor that carries a fifty-dollar fine as its maximum penalty. Does the Fourth Amendment limit the use of custodial arrests for fine-only traffic offenses?

TABLE OF CONTENTS

QUESTION PRESENTED i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES v

OPINIONS BELOW 1

JURISDICTION 1

CONSTITUTIONAL AND STATUTORY PROVISIONS 1

STATEMENT OF THE CASE 3

I. The Facts 3

II. The Proceedings Below 5

REASONS FOR GRANTING CERTIORARI 6

I. Whether the Fourth Amendment Places Any Restrictions on Using Custodial Arrests for Fine-Only Traffic Offenses Is an Important Issue of Federal Law 7

A. The Importance of this Issue Has Been Widely Recognized—Including by this Court 8

B. The Issue is Particularly Important Because of the Need to Resolve Confusion Among Lower Courts and to Correct the Error of the Fifth Circuit Court of Appeals 11

1. When confronted with the issue, lower courts have reached varied results 11

2. The Fifth Circuit *en banc* reached the wrong decision 13

a. *Whren v. United States* did not exempt custodial arrests from the Fourth Amendment's reasonableness requirement 14

b. The Fifth Circuit majority ignored the common law 15

c. The *en banc* majority eviscerates the holding of *Knowles v. Iowa* 17

II. This Case Offers a Particularly Suitable Vehicle for Resolving this Important Issue 18

A. This Case Better Frames the Fourth Amendment Issue than *Ricci v. Village of Arlington Heights*, in Which the Court Granted Certiorari 19

B. The Issue Has Been Thoroughly Considered Below in Multiple Opinions Produced by the Fifth Circuit's *En Banc* Consideration of this Case 20

C. This Set of Facts Presents the Issue in a Commonplace Setting Ideal for Consideration by this Court 21

CONCLUSION 24

APPENDIX

Appendix A
Court of Appeals *En Banc* Opinion - 11/24/99 . . . . 1a

Appendix B
Court of Appeals Panel Opinion - 1/29/99 . . . . . 28a

Appendix C
District Court Order - 2/13/98 . . . . . 50a

TABLE OF AUTHORITIES

Cases:

Atwater v. City of Lago Vista,
165 F.3d 380 (5th Cir. 1999) . . . . . *passim*

Atwater v. City of Lago Vista,
195 F.3d 242 (5th Cir. 1999) (en banc) . . . *passim*

Barnett v. United States,
525 A.2d 197 (D.C. App. 1987) 12, 13

Berkemer v. McCarty,
468 U.S. 420 (1984) 21, 23, 24

Carroll v. United States,
267 U.S. 132 (1925) 16, 21

Chimel v. California,
395 U.S. 752 (1969) 22-23

County of Riverside v. McLaughlin,
500 U.S. 44 (1991) 23

Delaware v. Prouse,
440 U.S. 648 (1979) 15

Draper v. United States,
358 U.S. 307 (1959) 22

Elder v. Holloway,
510 U.S. 510 (1994) 17

Fisher v. Washington Metro. Area Transit Auth.,
690 F.2d 1133 (4th Cir. 1982) 12

Gustafson v. Florida,
414 U.S. 260 (1973) 6, 9, 13, 21

Higbee v. City of San Diego,
911 F.2d 377 (9th Cir. 1990) 12

Knowles v. Iowa,
525 U.S. 113 (1998) 9, 14, 17-18, 21

Maryland v. Macon,
472 U.S. 463 (1985) 9

New York v. Belton,
453 U.S. 454 (1981) 21, 23

Payton v. New York,
445 U.S. 573 (1980) 14

Regina v. Tooley,
2 Ld. Raym. 1296, 92 Eng. Rep.
349 (K.B. 1710) 16

Ricci v. Village of Arlington Heights,
522 U.S. 1038 (1998) 3, 6, 8

Ricci v. Village of Arlington Heights,
523 U.S. 613 (1998) 3, 7, 8, 9

Ricci v. Village of Arlington Heights,
116 F.3d 288 (7th Cir. 1997),
cert. granted, 522 U.S. 1038,
cert. dism'd, 523 U.S. 613 (1998) . . . . . *passim*

Robbins v. California,
453 U.S. 420 (1981) 9, 11-12, 21

South Dakota v. Opperman,
428 U.S. 364 (1976) 23

State v. Hehman,
578 P.2d 527 (Wash. 1978) 13

Tennessee v. Garner,
471 U.S. 1 (1985) 14, 15

Thomas v. State,
614 So.2d 468 (Fla. 1993) 13

United States v. Mota,
982 F.2d 1384 (9th Cir. 1993) 12

United States v. Place,
462 U.S. 696 (1983) 14, 15

United States v. Robinson,
414 U.S. 218 (1973) 18, 21, 23

United States v. Watson,
423 U.S. 411 (1976) 12

Welsh v. Wisconsin,
466 U.S. 740 (1984) 14

Whren v. United States,
517 U.S. 806 (1996) 13, 14-15, 21

Wilson v. Arkansas,
514 U.S. 927 (1995) 17

Wyoming v. Houghton,
526 U.S. 295 (1999) 14, 16, 17, 21

Constitutional Provisions:

U.S. Const. amend. IV . . . . . *passim*

U.S. Const. amend. V 24

U.S. Const. amend. XIV 6, 24

Statutes:

28 U.S.C. § 1254(1) 1

Tex. Transp. Code Ann. § 521.025 (West 1999) 5

Tex. Transp. Code Ann. § 543.003 (West 1999) 4

Tex. Transp. Code Ann. § 543.004 (West 1999) 4

Tex. Transp. Code Ann. § 543.005 (West 1999) 4

Tex. Transp. Code Ann. § 545.413 (West 1999) . 2-3, 19

Tex. Transp. Code Ann. § 601.191 (West 1999) 5

Tex. Transp. Code Ann. § 601.193 (West 1999) 5

Rules:

Fed. R. App. P. 35(b)(1)(B) 9

Fifth Cir. I.O.P. foll. Local Rule 35.6 9

Miscellaneous:

Barbara C. Salken, *The General Warrant of the Twentieth Century? A Fourth Amendment Solution to Unchecked Discretion to Arrest for Traffic Offenses*, 62 Temple L. Rev. 221 (1993) 11

Halsbury's Laws of England, Vol. 9, part III, 612 16

Wayne R. LaFave, *Search and Seizure* (1st ed.1978) . . 12

Wayne R. LaFave, *Search and Seizure*
(3d ed. 1996) 10-11

William A. Schroeder, *Warrantless Misdemeanor Arrests and the Fourth Amendment*, 58 Mo. L. Rev. 771 (1993) 11

Transcript of Oral Argument, *Knowles v. Iowa*,
No. 97-7597, 1998 WL 781827 (Nov. 3, 1998) 9

Transcript of Oral Argument, *Ricci v. Village of Arlington Heights*, No. 97-501, 1998 WL 204590
(April 21, 1998) 8-9, 19

Reply Brief for Appellants, *Atwater v. City of Lago p Vista*, 165 F.3d 380 (5th Cir. 1999) 16

Brief of Appellees, *Atwater v. City of Lago Vista*, 165 F.3d 380 (5th Cir. 1999) 12

Appellees' Suggestion for Rehearing *En Banc*, *Atwater v. City of Lago Vista*, 165 F.3d 380 (5th Cir. 1999) 9

Brief of Respondent, *Ricci v. Village of Arlington Heights*, No. 97-501, 1998 WL 134006 19

Office of Highway Policy Information, Federal Highway Administration, Highway Statistics 1998, Table DL-1C: Licensed Drivers by Sex and Ratio to Population - 1998 7

OPINIONS BELOW

The decision of the Fifth Circuit Court of Appeals, sitting *en banc*, is reported at *Atwater v. City of Lago Vista*, 195 F.3d 242 (5th Cir. 1999) (en banc), and is reproduced in Appendix A to this Petition.

The decision of the three-judge panel of the Fifth Circuit Court of Appeals is reported at *Atwater v. City of Lago Vista*, 165 F.3d 380 (5th Cir. 1999), and is reproduced in Appendix B to this Petition.

The Order of the United States Court for the Western District of Texas, Austin Division, was not published, but is reproduced in Appendix C to this Petition.

JURISDICTION

The judgment of the Fifth Circuit Court of Appeals was entered on November 24, 1999. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

The Fourth Amendment to the Constitution provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Texas Transportation Code Ann. § 545.413, provides, in relevant part:

(a) A person commits an offense if the person:

(1) is at least 15 years of age;

(2) is riding in the front seat of a passenger car while the vehicle is being operated;

(3) is occupying a seat that is equipped with a safety belt; and

(4) is not secured by a safety belt.

(b) A person commits an offense if the person:

(1) operates a passenger car that is equipped with safety belts; and

(2) allows a child who is at least four years of age but younger than 15 years of age to ride in the front seat of the vehicle without requiring the child to be secured by a safety belt.

(c) A passenger car or a seat in a passenger car is considered to be equipped with a safety belt if the vehicle is required under Section 547.601 to be equipped with safety belts.

(d) An offense under this section is a misdemeanor punishable by a fine of not less than $25 or more than $50.

Tex. Transp. Code Ann. § 545.413 (West 1999) (subsequently amended effective Sept. 1, 1999).

STATEMENT OF THE CASE

This case presents the question of whether the Fourth Amendment limits the use of a full custodial arrest for a fine-only misdemeanor. The Court appeared ready to resolve the issue in 1998 when it granted certiorari on essentially the same question. *See Ricci v. Village of Arlington Heights*, 522 U.S. 1038 (1998) (No. 97-501) (granting cert. to 116 F.3d 288 (7th Cir. 1997)). Unfortunately, the Court subsequently dismissed certiorari after it became apparent during oral argument that the facts of the case did not actually raise the question presented. *See Ricci v. Village of Arlington Heights*, 523 U.S. 613 (1998) (dismissing cert. as improvidently granted). This case presents the Fourth Amendment issue that *Ricci* did not.

I. The Facts.

The facts of this case are straight-forward. Following a traffic stop, a Lago Vista police officer placed Petitioner Gail Atwater under full custodial arrest for violating a Texas statute that requires use of seat belts.

On March 26, 1997, Gail Atwater was driving her two children home from soccer practice. She was driving the family's pickup truck at approximately fifteen miles per hour on a residential street near her home. Her four-year-old son was seated in the middle of the front seat and her six-year-old daughter was seated on the passenger side. None were wearing seat belts.

Bart Turek, a Lago Vista police officer, observed the violation and stopped Ms. Atwater. While Ms. Atwater and her children remained in the truck, Officer Turek approached and screamed that they had met before or that they had had this conversation before. This frightened the children, who began to cry, so Ms. Atwater calmly and quietly requested that Officer Turek lower his voice. He responded by telling her that she was going to jail.

Without provocation, Officer Turek continued to speak to Ms. Atwater in a verbally abusive manner, accusing her of not caring for her children. Officer Turek claimed he had recently stopped Ms. Atwater for not having her children in seat belts, but this was false. He had stopped her several months before while with her son, but the boy's seat belt had been securely fastened. No citation had been issued, and Officer Turek had not told Ms. Atwater his basis for stopping her.

Police officers in Texas, as in other states, may issue tickets after stopping motorists for traffic violations. Tex. Transp. Code Ann. §§ 543.003-.005 (West 1999). Rather than doing this, Officer Turek placed Ms. Atwater under full custodial arrest.[1] He handcuffed her with her hands behind

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[1] Officer Turek later claimed that he had also arrested Ms. Atwater for not carrying a driver's license and proof of insurance. (She had neither with her because her purse recently had been stolen.) Officer Turek's claim is inconsistent with his pronouncement, before requesting her license or insurance, that he was taking her to jail. It is also disingenuous because Ms. Atwater provided him with her driver's license number, and Officer Turek had seen both her license and proof of insurance during the previous stop. Be that as it may, even if Officer Turek's after-the-fact justification is accepted, the penalties for these

her back, loaded her into his squad car, and took her to the police station. At the police station, she was forced to remove her shoes, jewelry and glasses, and empty her pockets. Ms. Atwater's "mug shot" was taken, and she was placed in a jail cell for approximately one hour until being taken before a magistrate.

Gail Atwater pled no contest to the seat belt offense and paid the maximum penalty for this violation — a fifty-dollar fine. The charges of driving without a license and proof of insurance were dismissed.

II. The Proceedings Below.

Petitioners Gail Atwater and her husband Michael Haas, as next friend for their children, filed suit in state court against the City of Lago Vista, Police Officer Bart Turek, and Chief of Police Frank Miller (collectively "the City" or "respondents") for damages suffered by petitioners arising from Ms. Atwater's incarceration.

The City removed the suit to the United States District Court for the Western District of Texas, which granted summary judgment for the City. The district court ruled that petitioners had not identified a constitutional right that had been violated by the custodial arrest.

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offenses are also minor fines. *See* Tex. Transp. Code Ann. §§ 521.025(c), 601.191(b) (West 1999). Furthermore, it is a defense to prosecution if the person charged thereafter produces a valid license and proof of insurance (as Officer Turek well knew that Ms. Atwater would be able to do). *See* Tex. Transp. Code Ann. §§ 521.025(d), 601.193 (West 1999). Officer Turek's contention has no bearing on the Fourth Amendment issue.

A three-judge panel of the United States Court of Appeals for the Fifth Circuit reversed the summary judgment with respect to the Fourth Amendment claim, holding petitioners had established that the custodial arrest for not wearing a seat belt violated a clearly established Fourth Amendment right. The remainder of the district court's judgment was affirmed.

The Fifth Circuit granted rehearing *en banc* and vacated the panel's decision. After oral argument, a majority affirmed the district court's judgment in all respects, holding that the custodial arrest did not violate Ms. Atwater's Fourth Amendment rights. Six judges dissented.

REASONS FOR GRANTING CERTIORARI

Twenty-six years ago, Justice Potter Stewart observed in *Gustafson v. Florida* that "[i]t seems to me that a persuasive claim might have been made in this case that the custodial arrest of the petitioner for a minor traffic offense violated his rights under the Fourth and Fourteenth Amendments. But no such claim has been made." *Gustafson v. Florida*, 414 U.S. 260, 266-67 (1973) (Stewart, J., concurring). The motorist had conceded the constitutionality of his arrest, and instead challenged only the search that followed.

Just over two years ago, this Court granted certiorari to consider whether an individual could be arrested without a warrant for a non-breach-of-the-peace misdemeanor. *Ricci v. Village of Arlington Heights*, 522 U.S. 1038 (1998) (No. 97-501) (granting cert. to 116 F.3d 288 (7th Cir. 1997)). However, after full briefing on the merits and oral argument, the Court learned the arrest was for the violation of a civil ordinance, not a misdemeanor, and certiorari was dismissed

as improvidently granted. *Ricci v. Village of Arlington Heights*, 523 U.S. 613 (1998) (dismissing cert. as improvidently granted).

Today, the instant case squarely presents the Fourth Amendment issue in the factual setting in which it most frequently arises: the ordinary traffic stop. Like Ms. Atwater, approximately 185 million Americans as of 1998 were licensed drivers.[2] At some point in their driving careers, virtually every one of them will violate *some* traffic law, making the impact of the question presented extremely wide-ranging. The facts of this case perfectly frame the issue for the Court's consideration.

I. Whether the Fourth Amendment Places Any Restrictions on Using Custodial Arrests for Fine-Only Traffic Offenses Is an Important Issue of Federal Law.

Recognition of the importance of the question presented here is widespread, and was most notably shown by the Court's decision to grant certiorari in *Ricci v. Village of Arlington Heights*. The importance has been heightened by divergent results reached by lower courts and the incorrect result reached by the court below.

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[2] Office of Highway Policy Information, Federal Highway Administration, Highway Statistics 1998, Table DL-1C: Licensed Drivers by Sex and Ratio to Population - 1998, http://www.fhwa.dot.gov/ohim/hs98/tables/dl1c.pdf.

A. The Importance of this Issue Has Been Widely Recognized—Including by this Court.

There is widespread recognition that the question presented here is an important issue of national law. Disparate entities and groups have made this clear: this Court in *Ricci* and individual members of the Court in other cases; the Fifth Circuit; respondents in this case; numerous public interest groups; and respected legal commentators. Finally, the issue is particularly important to the average American citizen.

The issue's importance is most apparent from the Court's granting of certiorari on essentially the same issue just two years ago. The Court granted certiorari to consider what limits the Fourth Amendment places on custodial arrests for non-breach-of-the-peace misdemeanors. *Ricci v. Village of Arlington Heights*, 522 U.S. 1038 (1998) (No. 97-501) (granting cert. to 116 F.3d 288 (7th Cir. 1997)). The question remains unanswered, however, because after full briefing on the merits and oral argument, the Court dismissed certiorari as improvidently granted. 523 U.S. 613 (1998).[3]

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[3] In *Ricci*, the petitioner, who had been arrested at his place of business for operating without a business license, argued unsuccessfully to the Seventh Circuit that "the common law allowed arrest for a misdemeanor committed in an officer's presence only if that crime constituted a breach of the peace." *Ricci v. Village of Arlington Heights*, 116 F.3d 288, 289, 291 (7th Cir. 1997), *cert. granted*, 522 U.S. 1038, *cert. dism'd*, 523 U.S. 613 (1998). The Court granted certiorari to consider the issue, but unfortunately, the question presented had no relation to Ricci's case: the offense for which he had been arrested was not a misdemeanor, but a non-criminal civil infraction. *See* Transcript of Oral Argument, *Ricci v. Village of Arlington Heights*, No. 97-501, at 14, 33, 35-37, 59-

Individual members of this Court also have recognized the importance of the question presented in other cases. *See, e.g., Gustafson v. Florida*, 414 U.S. 260, 266-67 (1973) (Stewart, J., concurring); *Robbins v. California*, 453 U.S. 420, 450 n.11 (1981) (Stevens, J., dissenting); *cf. Maryland v. Macon*, 472 U.S. 463, 471 (1985) ("We leave to another day the question whether the Fourth Amendment prohibits a warrantless arrest for the state law misdemeanor of distribution of obscene materials."). Furthermore, just a few months after the dismissal of certiorari in *Ricci*, the issue re-emerged during the oral argument for *Knowles v. Iowa*, 525 U.S. 113 (1998), when one Justice asked: "I hadn't realized that you had raised the question that Justice Stewart left over in the *Gustafson* case, which was whether you could have constitutionally a full arrest for a traffic violation." Transcript of Oral Argument, *Knowles v. Iowa*, No. 97-7597, at 5, 1998 WL 781827 (Nov. 3, 1998). (The petitioner in *Knowles* conceded he had not raised this issue.)

Recognition of the issue's importance extends beyond this Court. The Fifth Circuit recognized its importance when it granted rehearing *en banc* in this case, which it does only for issues "of exceptional public importance." Fifth Cir. I.O.P. foll. Local Rule 35.6. Respondents themselves have represented that the case presented "questions of exceptional importance" when they sought the *en banc* rehearing. Appellees' Suggestion for Rehearing *En Banc* at iii, *Atwater v. City of Lago Vista*, 165 F.3d 380 (5th Cir. 1999); *see also* Fed. R. App. P. 35(b)(1)(B).

63, 1998 WL 204590 (April 21, 1998). Certiorari was dismissed as improvidently granted. 523 U.S. 613 (1998).

Moreover, numerous public interest groups have been moved to weigh in on the issue. When the subject was before the Court in *Ricci*, eleven non-parties (including the federal government) filed *amicus* briefs. In addition to the Solicitor General's brief, *amicus* briefs were filed on behalf of the American Civil Liberties Union, the ACLU of Illinois, the National Association of Criminal Defense Lawyers, the Institute for Justice, the National League of Cities, the U.S. Conference of Mayors, the National Governors' Association, the National Association of Counties, the International Municipal Lawyers' Association, and the International City/County Management Association.

The importance of the issue also has moved legal commentators to write on the topic, the most prominent of whom urged the Court to address the issue and explained its importance:

> It may be that on a future occasion the Court will conclude that there are some constitutional limits upon the use of "custodial arrests" as the means for invoking the criminal process when relatively minor offenses are involved. Such a holding would be most desirable, as it would address specifically a current problem of considerable seriousness: the arbitrariness and inequality which attends unprincipled utilization of the "custodial arrest" and citation alternatives. Moreover, it would substantially diminish the opportunities for pretext arrests, and thus would make the *Robinson-Gustafson* "standardized procedures" approach to searches of the person incident to arrest much more palatable.

3 Wayne R. LaFave, *Search and Seizure* § 5.2(g), at 94 (3d ed. 1996) (footnote omitted). *See also* William A. Schroeder, *Warrantless Misdemeanor Arrests and the Fourth Amendment*, 58 Mo. L. Rev. 771 (1993); Barbara C. Salken, *The General Warrant of the Twentieth Century? A Fourth Amendment Solution to Unchecked Discretion to Arrest for Traffic Offenses*, 62 Temple L. Rev. 221 (1993).

Finally, the question presented is extremely important to the average American. Virtually all of the approximately 185 million licensed drivers in this country will violate at least one traffic law over the course of their driving careers. Yet a custodial arrest is one of the most extreme governmental intrusions imaginable from the perspective of the average citizen. Whether the Fourth Amendment places any limitations on the use of custodial arrests for a fine-only traffic offense potentially impacts every driver in this country.

B. The Issue is Particularly Important Because of the Need to Resolve Confusion Among Lower Courts and to Correct the Error of the Fifth Circuit Court of Appeals.

As long as this important Fourth Amendment issue remains unanswered by this Court, lower courts will struggle and outcomes will differ. Without guidance, lower courts have taken varied approaches, with that of the Fifth Circuit being the most wrought with error.

1. When confronted with the issue, lower courts have reached varied results.

As Justice Stevens noted in *Robbins v. California*, "the Court has not directly considered the question whether 'there are some constitutional limits upon the use of "custodial

arrests" as the means for invoking the criminal process when relatively minor offenses are involved.'" *Robbins v. California*, 453 U.S. 420, 450 n.11 (1981) (Stevens, J., dissenting) (quoting 2 Wayne R. LaFave, *Search and Seizure* § 5.2, at 290 (1st ed. 1978)). The result has been a myriad of approaches on the part of lower courts.

One approach has been simply to assume, without any analysis, that the rule announced in *United States v. Watson*, 423 U.S. 411, 414-24 (1976), which permits warrantless arrests for felonies as long as there is probable cause, likewise applies to warrantless arrests for even the least serious misdemeanor. *Higbee v. City of San Diego*, 911 F.2d 377, 379 (9th Cir. 1990) ("A police officer is permitted to arrest without a warrant if a misdemeanor *or a felony* is committed in the officer's presence.") (citing *Watson*) (emphasis added); *Fisher v. Washington Metro. Area Transit Auth.*, 690 F.2d 1133, 1139 n.6 (4th Cir. 1982) (choosing to "assume" that probable cause is the only issue until hearing from the Supreme Court that reasonableness is part of the inquiry). The *en banc* majority of the Fifth Circuit made this assumption. *See* App. A at 4a, 195 F.3d at 244. Likewise, respondents' arguments have been based on this assumption. *See, e.g.*, Brief of Appellees at 12, *Atwater v. City of Lago Vista*, 165 F.3d 380 (5th Cir. 1999).

Other lower courts have avoided the constitutional issue and found custodial arrests improper for minor offenses based on state-law grounds. *See, e.g., United States v. Mota*, 982 F.2d 1384, 1387 (9th Cir. 1993) (refusing to "sanction an otherwise unconstitutional search on the basis of an arrest which is illegal as a matter of state law"); *Barnett v. United States*, 525 A.2d 197, 199-200 & n.6 (D.C. App. 1987) (arrests not permitted for civil infractions with only a monetary sanction). At times, there is an indication that the

court regarded the custodial arrest as unconstitutional as well, but these decisions seem tied to the facts of the case and to the determination that the arrest was invalid under state law. *See, e.g., Barnett*, 525 A.2d at 199 ("[I]t was not reasonable, within the strictures of the Fourth Amendment, for [the police officer] to effect a full custodial arrest accompanied by a body search.").

At least one state high court reached the opposite result from the decision below purely as a matter of public policy, where even state law did not compel the result. *State v. Hehman*, 578 P.2d 527, 528-29 (Wash. 1978). In doing so, the Supreme Court of Washington noted Justice Stewart's concurring opinion in *Gustafson*. *Hehman*, 578 P.2d at 529. *See also Thomas v. State*, 614 So.2d 468 (Fla. 1993) (Fourth Amendment violated by a full custodial arrest rather than the issuance of a citation for the violation of a noncriminal civil ordinance). Without guidance from this Court, outcomes and analyses will continue to vary widely depending on the jurisdiction in which the traffic stop occurs.

2. The Fifth Circuit *en banc* reached the wrong decision.

The three-judge panel decision of the Fifth Circuit recognized that this Court's Fourth Amendment jurisprudence compels the conclusion that placing Ms. Atwater under custodial arrest under the circumstances of this case violated her Fourth Amendment rights. The Fifth Circuit *en banc* majority reached the opposite conclusion because it erred in three ways. First, the majority did not balance the City's interest in enforcing the seat belt law against the extent of the governmental intrusion to test the reasonableness of using a full custodial arrest, a misapplication of *Whren v. United States*, 517 U.S. 806 (1996). Second, the majority refused to

include the common law as part of its Fourth Amendment analysis, ignoring the mandate that it do so in *Wyoming v. Houghton*, 526 U.S. 295, ___, 119 S. Ct. 1297, 1300 (1999). Third, the majority effectively eviscerated the holding of this Court in *Knowles v. Iowa*, 525 U.S. 113 (1998).

a. *Whren v. United States* did not exempt custodial arrests from the Fourth Amendment's reasonableness requirement.

It is beyond dispute "that the warrantless arrest of a person is a species of seizure required by the [Fourth] Amendment to be reasonable." *Payton v. New York*, 445 U.S. 573, 585 (1980). Further, all seizures must be made in a reasonable manner, despite the existence of probable cause. *Tennessee v. Garner*, 471 U.S. 1, 7-8 (1985). As the Court has explained, "[t]o determine the constitutionality of a seizure '[w]e must balance the nature and quality of the intrusion on the individual's Fourth Amendment interests against the importance of the governmental interests alleged to justify the intrusion.'" *Garner*, 471 U.S. at 8 (quoting *United States v. Place*, 462 U.S. 696, 703 (1983)).

Any balancing of the competing interests of law enforcement and individual autonomy establishes the unreasonableness of Ms. Atwater's custodial arrest. The government's side of the scale is basically empty. The small fine indicates a relatively slight governmental interest in the seat belt law's enforcement. *Welsh v. Wisconsin*, 466 U.S. 740, 754 n.14 (1984). Further, absolutely none of the many factors that can make a custodial arrest appropriate to accomplish a legitimate law enforcement objective were present in this case. *See* App. A at 17a-18a, 195 F.3d at 250 (Weiner, J., dissenting). In contrast to the lack of interests on the government's side of the scale, Ms. Atwater faced a

significant deprivation of her freedom in the form of a full custodial arrest.

The Fifth Circuit avoided applying this test – which necessarily results in a conclusion that Ms. Atwater's Fourth Amendment rights were violated – by assuming that *Whren v. United States*, 517 U.S. 806 (1996), somehow made it unnecessary to apply any balancing test. But the validity of a custodial arrest was not considered in *Whren*: the Court considered only "whether the temporary detention of a motorist" violated the Fourth Amendment. *Whren*, 517 U.S. at 808. The court below therefore erred in citing it as a basis for not balancing the competing interests implicated by these facts, balancing this Court has done in numerous decisions. *See, e.g., Garner*, 471 U.S. at 9-11, 20-21 (1985) (balancing competing governmental and individual interests to conclude that use of deadly force to apprehend a burglary suspect was unreasonable under the Fourth Amendment); *United States v. Place*, 462 U.S. 696, 703-06 (1983) (balancing competing governmental and individual interests to conclude that briefly detaining luggage to be sniffed by a narcotics-detecting dog was reasonable under the Fourth Amendment); *Delaware v. Prouse*, 440 U.S. 648, 654-55, 663 (1979) (balancing competing governmental and individual interests to conclude that stopping an automobile and detaining the driver without an articulable suspicion was unreasonable under the Fourth Amendment).

b. The Fifth Circuit majority ignored the common law.

The court below also went to great lengths to avoid considering whether the common law at the time of the Fourth Amendment's adoption would have prohibited a custodial arrest for a minor criminal offense. The majority opinion

thereby ignored this Court's recent mandate that when determining whether a particular governmental action violates the Fourth Amendment, "we inquire first whether the action was regarded as an unlawful search or seizure under the common law when the Amendment was framed." *Wyoming v. Houghton*, 526 U.S. 295, ___, 119 S. Ct. 1297, 1300 (1999).

There is significant authority indicating that a custodial arrest would not have been sanctioned at common law for the minor criminal offense at issue in this case. *See, e.g., Carroll v. United States*, 267 U.S. 132, 157 (1925) (quoting Halsbury's Laws of England, Vol. 9, part III, 612) ("A peace officer like a private person has at common law no power of arresting without a warrant except when a breach of the peace has been committed in his presence or there is reasonable ground for supposing that a breach of the peace is about to be committed or renewed in his presence."); *Regina v. Tooley*, 2 Ld. Raym. 1296, 1301, 92 Eng. Rep. 349, 352 (K.B. 1710) (Lord Holt, J.) (observing that "a constable cannot arrest, but when he sees an actual breach of the peace; and if the affray be over, he cannot arrest").

The *en banc* majority's excuse for not considering this authority was that petitioners had not cited it to the district court or three-judge panel,[4] even though the panel decision itself relied upon common-law authority to reach its decision. There are at least two problems with this position. First, nearly every decision of this Court considering the scope of the Fourth Amendment, including those cited by petitioners

[4] Actually, petitioners did cite the panel to authority addressing the common-law issue. Reply Brief for Appellants at 10, *Atwater v. City of Lago Vista*, 165 F.3d 380 (5th Cir. 1999).

at every stage of this case as well as those cited by the majority opinion, rely upon the common law to some extent. Citing any of this Court's Fourth Amendment decisions necessarily means raising principles inextricably linked to the common law. Second, even if there were any merit to the Fifth Circuit's position that not citing specific authorities can waive an argument that supports – and is necessarily included in – an issue that was raised, this Court has made clear that in section 1983 cases, appellate courts are not limited to considering the specific authority cited to the district court. *Elder v. Holloway*, 510 U.S. 510, 511-12 (1994) (qualified immunity dispositions reviewed in light of all relevant precedents, not simply those cited to, or discovered by, the district court).

Whether analyzing the common law is a threshold inquiry in Fourth Amendment analysis, *Houghton*, 526 U.S. at ___, 119 S. Ct. at 1300, or the common law "forms a part of the reasonableness inquiry," *Wilson v. Arkansas*, 514 U.S. 927, 929 (1995), it is inseparable from the Fourth Amendment. A court considering a Fourth Amendment issue cannot just pretend the common law does not exist.

c. The *en banc* majority eviscerates the holding of *Knowles v. Iowa*.

This Court held in *Knowles v. Iowa* that a police officer could not search a car following a traffic stop where the officer issued the driver a citation and had not placed the driver under arrest. *Knowles v. Iowa*, 525 U.S. 113, 114 (1998). The court below, however, held that an officer may place a person under custodial arrest whenever an officer has probable cause to believe that any traffic violation has occurred, however minor.

This eviscerates any protection provided by *Knowles* against full searches of vehicles following traffic stops when there is no justification for a search other than the traffic violation itself. Any officer wishing to avoid the holding of *Knowles* need only place the driver under custodial arrest for the traffic violation, and thereafter search the vehicle as a search incident to arrest. *United States v. Robinson*, 414 U.S. 218 (1973).[5] If the majority's decision is allowed to stand, the holding of *Knowles* will cease to provide any protection to the average citizen. And even worse, it will *encourage* law enforcement officers who wish to search automobiles after traffic stops to place drivers under custodial arrest for even the most insignificant traffic violations.

II. This Case Offers a Particularly Suitable Vehicle for Resolving this Important Issue.

This case presents the ideal factual framework to consider the question presented. While *Ricci v. Village of Arlington Heights* appeared at first blush to frame the Fourth Amendment issue well, this case is better, surpassing *Ricci* on every comparison. Further, the issue comes to this Court after having been addressed in depth by five written opinions in the Fifth Circuit. Finally, the straight-forward and commonplace facts of this case highlight the nature of a full custodial arrest and will not cloud resolution of the legal issue.

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[5] Indeed, an inventory search of Ms. Atwater's vehicle was performed in this case.

A. This Case Better Frames the Fourth Amendment Issue than *Ricci v. Village of Arlington Heights*, in Which the Court Granted Certiorari.

Ricci v. Village of Arlington Heights initially appeared to squarely present the Fourth Amendment issue regarding use of custodial arrests for minor offenses. Unfortunately, its clearly-worded question presented was not raised by the facts of the case. The present case, in contrast, has none of *Ricci*'s faults.

First, this case does not have the shortcoming that apparently resulted in the dismissal of the petition in *Ricci*. The seat belt offense for which Gail Atwater was arrested is a criminal offense, albeit a minor one. It is a misdemeanor punishable by a maximum fifty-dollar fine. Tex. Transp. Code Ann. § 545.413(d) (West 1999). In contrast, the business ordinance at issue in *Ricci* was not a criminal offense, but a civil infraction. *See* Transcript of Oral Argument, *Ricci v. Village of Arlington Heights*, No. 97-501, at 14, 33, 36-37, 1998 WL 204590 (April 21, 1998).

There is no dispute that Gail Atwater was subjected to a full custodial arrest. The petitioner in *Ricci* was arguably subjected to something less than a full custodial arrest. Brief of Respondent at 9-10, *Ricci v. Village of Arlington Heights*, (No. 97-501). While Ricci was not handcuffed, Gail Atwater was handcuffed behind her back in full view of her neighbors and her children. *Compare* Brief of Respondent at 3, *Ricci v. Village of Arlington Heights*, (No. 97-501), *with* App. A at 2a, 13a; 195 F.3d at 244; 195 F.3d at 248 (Weiner, J., dissenting); App. B at 30a-31a; 165 F.3d at 382. Ricci was simply brought to the police station for the processing of a bond, and made to wait in a locked interrogation room while this was done. *Ricci*, 116 F.3d at 289. Gail Atwater was

taken to the police station for booking, where her "mug shot" was taken, glasses, jewelry, shoes, and other personal effects were taken away from her, and she was locked in a jail cell. *See* App. A at 13a; 195 F.3d at 248 (Weiner, J., dissenting); App. B at 31a; 165 F.3d at 382-83.

B. The Issue Has Been Thoroughly Considered in Multiple Opinions Produced by the Fifth Circuit's *En Banc* Consideration of this Case.

Because the Fifth Circuit considered this case on rehearing *en banc*, many of the arguments have already been explored in detail by the court below.

The Fifth Circuit was sharply divided on rehearing. The eleven-judge majority opinion concluded that a person may be placed under custodial arrest for *any* criminal offense so long as there is probable cause to believe that the offense occurred. *See* App. A at 3a-5a, 195 F.3d at 244-45.

In contrast, four different written opinions prepared by the six dissenting Judges disagreed with the majority opinion and concluded that the arrest of Ms. Atwater for not wearing a seat belt violated her rights under the Fourth Amendment. *See* App. A at 8a-11a, 195 F.3d at 246-47 (R. Garza, J., dissenting); App. A at 11a-20a, 195 F.3d at 247-51 (Weiner, J., dissenting); App. A at 20a-27a, 195 F.3d at 251-54 (Dennis, J., dissenting); App. B, 165 F.3d 380 (Parker, J.) (adopted as dissenting opinion of Stewart, J., on rehearing *en banc*, App. A at 1a-2a n.*, 195 F.3d at 243 n.*).

In short, the question presented has been considered more thoroughly here than in any other case.

C. This Set of Facts Presents the Issue in a Commonplace Setting Ideal for Consideration by this Court.

Finally, because this case arises from a traffic stop, it is particularly appropriate for consideration of whether the Fourth Amendment limits the use of custodial arrests for minor criminal offenses. This Court is extremely familiar with balancing the competing interests of effective law enforcement and the individual's right to be free from unreasonable governmental intrusions against the factual backdrop of a police officer's stop of a motor vehicle. *Wyoming v. Houghton*, 526 U.S. 295 (1999); *Knowles v. Iowa*, 525 U.S. 113 (1998); *Whren v. United States*, 517 U.S. 806 (1996); *Berkemer v. McCarty*, 468 U.S. 420 (1984); *Robbins v. California*, 453 U.S. 420 (1981); *New York v. Belton*, 453 U.S. 454 (1981); *Gustafson v. Florida*, 414 U.S. 260 (1973); *United States v. Robinson*, 414 U.S. 218 (1973); *Carroll v. United States*, 267 U.S. 132 (1925). Perhaps this is true because so many Americans are licensed drivers and their most common interaction with police occurs during a traffic stop. The straight-forward facts of this case vary little from the numerous traffics stops that occur every day – except that Gail Atwater was placed under full custodial arrest.

The fact that this was a full custodial arrest of an average citizen after a normal traffic stop makes this case all the more appropriate for consideration by this Court. The Fourth Amendment issue is particularly well-presented because this is *not* a criminal defendant challenging the arrest.

The interests of the majority of law-abiding Americans usually are not well represented by those who raise Fourth Amendment issues before this Court. Most of the Court's

decisions construing the Fourth Amendment involve a criminal defendant contending the exclusionary rule applies, thereby prohibiting the admission of probative evidence.[6]

The interests of criminal defendants and the average citizen are not the same. The natural concern of a criminal defendant seeking to avoid conviction is having the *search* that uncovered incriminating evidence held unconstitutional. The invalidity of an arrest is relevant only to the extent that it can invalidate a search, not because of the intrusive nature of the arrest itself. In contrast, for the average, law-abiding citizen with no contraband or incriminating evidence to hide, most searches are significantly less of a governmental invasion than the traumatic experience of being placed under full custodial arrest.

Members of this Court have recognized this. "[T]he invasion and disruption of a man's life and privacy which stem from his arrest are ordinarily far greater than the

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[6] As Justice Douglas astutely observed over forty years ago:

> Decisions under the Fourth Amendment, taken in the long view, have not given the protection to the citizen which the letter and spirit of the Amendment would seem to require. One reason, I think, is that wherever a culprit is caught red-handed, as in leading Fourth Amendment cases, it is difficult to adopt and enforce a rule that would turn him loose. A rule protective of law-abiding citizens is not apt to flourish where its advocates are usually criminals.

Draper v. United States, 358 U.S. 307, 333-34 (1959) (Douglas, J., dissenting).

relatively minor intrusions attending a search of his premises." *Chimel v. California*, 395 U.S. 752, 776 (1969) (White, J., dissenting); *see also United States v. Robinson*, 414 U.S. 218, 237 (1973) (Powell, J., concurring) (the custodial arrest, not the search, "is the significant intrusion of state power into the privacy of one's person").

A custodial arrest includes a search of the arrestee's entire body, and of the contents of pockets and any containers found within the person's reach. *New York v. Belton*, 453 U.S. 454, 460-61 n.4 (1981). Likewise, an inventory search of the vehicle may be performed and the vehicle impounded, with money charged for storage and the vehicle's release. *South Dakota v. Opperman*, 428 U.S. 364, 367-76 (1976). Further, the arrestee can experience the public humiliation of being led away in handcuffs, and, once transported to the police station, fingerprinted and booked, and personal items taken away. The person then potentially faces incarceration for as long as forty-eight hours without a judicial determination of probable cause. *County of Riverside v. McLaughlin*, 500 U.S. 44, 56-57 (1991).

The repercussions of a custodial arrest continue after detention ends. The arrest will be a matter of public record, maintained and disseminated, potentially damaging the person's reputation. Further, an arrest record can make it difficult – and at times impossible – to obtain employment.

Although both traffic stops and custodial arrests are Fourth Amendment "seizures," *Berkemer v. McCarty*, 468 U.S. 420, 436-37 (1984), it is well-settled that a custodial arrest is a far greater governmental intrusion than the brief roadside detention typically associated with a traffic stop that ends with issuance of a citation. In recognition of this, there are fewer constitutional protections implicated by the lesser

governmental intrusion of the traffic stop. *Berkemer*, 468 U.S. at 437-38, 440 (because traffic stops are "presumptively temporary and brief," *Miranda* warnings need not be given).

For the average motorist, as it was for Ms. Atwater here, a custodial arrest is a greater governmental intrusion than a traffic stop or a search, and far worse than the punishment imposed for the violation itself. *See* App. A at 18a, 195 F.3d at 250 (Weiner, J., dissenting) (noting that the arrest amounted to Officer Turek's punishing of Ms. Atwater, which "is also, at least potentially, an independent violation of the Fifth and Fourteenth Amendments, which permit the infliction of punishment only after a formal adjudication"). This case presents an ideal opportunity to consider a Fourth Amendment challenge to the use of a custodial arrest for a minor criminal offense, a challenge brought by a typical motorist, not motivated by a desire to invalidate a subsequent search and exclude probative evidence.

CONCLUSION

Even the most law-abiding Americans violate minor traffic laws from time to time. They expect that, if observed by a police officer, they will get a ticket. These millions of licensed drivers, however, do not expect to be placed under custodial arrest for traffic offenses punished only by fines. Petitioners respectfully request that this Court grant their petition for writ of certiorari, and address the Fourth Amendment limits on custodial arrests for fine-only traffic offenses — offenses that can be enforced just as effectively by issuing traffic citations.

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

[Filed November 24, 1999]

No. 98-50302

Gail ATWATER, Individually; Michael Haas, Dr., As next friend of Anya Savannah Haas and Mackinley Xavier Haas, *Plaintiffs-Appellants*,	)
v.	)
CITY OF LAGO VISTA, Bart Turek, and Frank Miller, Chief of Police, Lago Vista, *Defendants-Appellees*.	)

Before KING, Chief Judge, and REYNALDO G. GARZA, POLITZ, JOLLY, HIGGINBOTHAM, DAVIS, JONES, SMITH, DUHÉ, WIENER, BARKSDALE, EMILIO M. GARZA, DeMOSS, BENAVIDES, STEWART, PARKER and DENNIS, Circuit Judges.*

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* Chief Judge King and Judges Jolly, Higginbotham, Davis, Jones, Smith, Duhé, Barksdale, DeMoss, and Benavides concur in the majority opinion. Judge Parker concurs in the dissent of Judge Reynaldo G. Garza. Judges Reynaldo G. Garza, Politz, and Parker concur in the dissent of Judge Wiener. Judge Stewart dissents for the reasons set forth in the panel decision. *See Atwater v. City of Lago Vista*, 165 F.3d 380 (5th Cir.1999). Judges Reynaldo G. Garza, Politz, and Parker concur in the dissent of Judge Dennis.

EMILIO M. GARZA, Circuit Judge:

Plaintiffs-Appellants Gail Atwater ("Atwater") and Michael Haas ("Haas"), as next friend of Anya Savannah Haas and Mackinley Xavier Haas, appealed the district court's grant of summary judgment in favor of Defendants-Appellees Officer Bart Turek ("Officer Turek"), Police Chief Frank Miller ("Chief Miller"), and the City of Lago Vista. A panel of this court reversed in part and remanded. *See Atwater v. City of Lago Vista*, 165 F.3d 380 (5th Cir.1999), *reh'g en banc granted*, 171 F.3d 258 (5th Cir.1999). We vacated the panel opinion, see 5th Cir. R. 41.3, and granted rehearing *en banc*.

I

Officer Turek arrested Gail Atwater for failing to wear her seat belt, failing to fasten her children in seat belts, driving without a license, and failing to provide proof of insurance. Officer Turek handcuffed Atwater and took her to jail, where she spent approximately one hour. Atwater appeared before a magistrate and was released after posting bond.

Atwater and her husband, Haas, subsequently brought various federal and state law claims against Officer Turek, Chief Miller, and the City of Lago Vista, arising out of Atwater's arrest.[1] Officer Turek, Chief Miller and the City of Lago Vista moved for summary judgment. The district court granted this motion.

A panel of this court reversed the district court's summary judgment with respect to Atwater's Fourth Amendment unreasonable seizure claim against Officer Turek and the City of Lago Vista and concluded that Officer Turek was not entitled to qualified immunity. *See Atwater*, 165 F.3d at 389.[2] We granted rehearing *en banc* to reconsider the panel decision.

II

To determine the constitutionality of an arrest, "[w]e must balance the nature and quality of the intrusion on the individual's Fourth Amendment interests against the importance of the governmental interests alleged to justify the

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[1] Atwater and Haas alleged causes of action for: (1) Deprivation of Constitutional Rights, (2) Excessive Use of Force, (3) False Imprisonment, (4) Inadequate Training, (5) Failure to Supervise, (6) Intentional Infliction of Emotional Distress, (7) Assault and Battery, (8) Grossly Negligent Hiring and Retention, (9) Conspiracy to Formulate and Enforce a Municipal Policy to Violate Constitutional Rights, and (10) Common Fund.

[2] The panel affirmed the district court's summary judgment on all other claims. *See Atwater*, 165 F.3d at 389. We reinstate this part of the panel opinion.

intrusion." *Tennessee v. Garner*, 471 U.S. 1, 8, 105 S.Ct. 1694, 1699, 85 L.Ed.2d 1 (1985) (quotations omitted) (alteration in original). If an arrest is based on probable cause then "with rare exceptions . . . the result of that balancing is not in doubt." *Whren v. United States*, 517 U.S. 806, 817, 116 S.Ct. 1769, 1776, 135 L.Ed.2d 89 (1996). In other words, when probable cause exists to believe that a suspect is committing an offense, the government's interests in enforcing its laws outweigh the suspect's privacy interests, and an arrest of the suspect is reasonable. *See, e.g., United States v. Robinson*, 414 U.S. 218, 235, 94 S.Ct. 467, 477, 38 L.Ed.2d 427 (1973) ("A custodial arrest of a suspect based on probable cause is a reasonable intrusion under the Fourth Amendment. . . .").

We deviate from this principle – that an arrest based on probable cause is reasonable under the Fourth Amendment – only when an arrest is "conducted in an extraordinary manner, unusually harmful to an individual's privacy or even physical interests."[3] *Whren*, 517 U.S. at 818,

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[3] Atwater advances an alternative argument for the first time in her *en banc* brief. She argues that in determining whether her arrest violated the Fourth Amendment, we should follow the common law rule that existed when the Fourth Amendment was promulgated, which she claims limited the circumstances under which a misdemeanant could be arrested without a warrant. She did not raise this argument before the district court or the panel that initially considered this case. Instead, the panel considered this argument *sua sponte*, and even though it ruled in Atwater's favor, it declined to do so based on the common law rule. *See Atwater v. City of Lago Vista*, 165 F.3d 380, 386 (5th Cir.1999) (noting the common law rule and stating that "[a]lthough the Fourth

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Amendment and common law do not always coincide, the Supreme Court has recognized the logic of distinguishing between minor and serious offenses in evaluating the reasonableness of a seizure under the Fourth Amendment"). Because Atwater did not properly raise this argument previously, she has waived her right to pursue this issue here. *See Craddock Int'l Inc. v. W.K.P. Wilson & Son, Inc.*, 116 F.3d 1095, 1105 (5th Cir.1997) ("To prevail on an issue raised for the first time on appeal, an appellant must show a plain (clear or obvious) error that affects substantial rights."); *cf. Arenson v. Southern Univ. Law Ctr.*, 53 F.3d 80, 81 (5th Cir.1995) (per curiam) ("Appellant's request [in his petition for rehearing] for Title VII relief is denied because Arenson waived his Title VII claim by failing to seek a ruling on that issue from the Arenson I panel.").

Moreover, Atwater is unable to cite any cases where courts have invoked the common law rule to invalidate warrantless misdemeanor arrests otherwise supported by probable cause. Indeed, the cases uniformly uphold warrantless misdemeanor arrests where probable cause exists, even where variants of the common law standards to which Atwater refers are incorporated into state law and raised before the court. *See Vargas-Badillo v. Diaz-Torres*, 114 F.3d 3, 6 (1st Cir.1997) ("To date, neither the Supreme Court nor this circuit ever has held that the Fourth Amendment prohibits warrantless arrests for misdemeanors not committed in the presence of arresting officers."); *Pyles v. Raisor*, 60 F.3d 1211, 1215 (6th Cir.1995) (rejecting a Fourth Amendment challenge to a misdemeanor arrest when probable cause existed, even though the arrest may have violated the plaintiff's state right "as an alleged misdemeanant to be arrested only when the misdemeanor is committed in the presence of the arresting officer"); *Fields v. City of South Houston*, 922 F.2d 1183, 1189 (5th Cir.1991) (upholding a misdemeanor arrest supported by

116 S.Ct. at 1776. For example, it is "necessary actually to perform" a balancing analysis notwithstanding the existence of probable cause when a search or seizure involves deadly force, an unannounced entry into a home, entry into a home without a warrant, or physical penetration of the body. *See id.* (reviewing cases).

After reviewing the record, we conclude that Officer Turek had probable cause to arrest Atwater and that he did not conduct the arrest in such an "extraordinary manner." Neither party disputes that Officer Turek had probable cause to arrest Atwater. Atwater admits that she was not wearing her seat belt and that she had not belted in her children. Operating a motor vehicle without wearing a seat belt violates Texas law,[4] and Officer Turek had discretion to arrest

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probable cause and stating that "[t]he United States Constitution does not require a warrant for misdemeanors not occurring in the presence of the arresting officer"); *Barry v. Fowler*, 902 F.2d 770, 772 (9th Cir.1990) ("The requirement that a misdemeanor must have occurred in the officer's presence to justify a warrantless arrest is not grounded in the Fourth Amendment."); *Street v. Surdyka*, 492 F.2d 368, 371-72 (4th Cir.1974) ("We do not think the fourth amendment should now be interpreted to prohibit warrantless arrests for misdemeanors committed outside an officer's presence."); *cf. Whren*, 517 U.S. at 819, 116 S.Ct. at 1777 ("Here the District Court found that the officers had probable cause to believe that petitioners had violated the traffic code. That rendered the stop reasonable under the Fourth Amendment. . . .").

[4] Section 545.413 of the Texas Transportation Code provides:

(a) A person commits an offense if the person:

Atwater without a warrant, *see* Tex. Transp. Code § 543.001; *United States v. Wadley*, 59 F.3d 510, 512 (5th Cir.1995) ("Probable cause for a warrantless arrest exists when the totality of facts and circumstances within a police officer's knowledge at the moment of arrest are sufficient for a reasonable person to conclude that the suspect had committed or was committing an offense."). Moreover, there is no evidence in the record that Officer Turek conducted the arrest in an "extraordinary manner, unusually harmful" to Atwater's privacy interests. *Whren*, 517 at 818, 116 S.Ct. at 1776. The only physical contact between Officer Turek and Atwater occurred when he placed her in handcuffs. Atwater admits that she did not suffer any physical harm during or as a result of the arrest. We therefore conclude that, because it was based on probable cause and because it was not conducted in the above-described "extraordinary manner," Officer Turek's arrest of Atwater was reasonable under the Fourth Amendment.[5] *See id.*

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(1) is at least 15 years of age;
(2) is riding in the front seat of a passenger car while the vehicle is being operated;
(3) is occupying a seat that is equipped with a safety belt; and
(4) is not secured by a safety belt.

TEX. TRANS. CODE ANN. § 545.413

[5] Having concluded that Officer Turek's arrest of Atwater did not violate the Fourth Amendment, we need not address whether Officer Turek is entitled to qualified immunity. *See, e.g., Channer v. Hall*, 112 F.3d 214, 219 n. 8 (5th Cir.1997) ("Because we hold that Channer's Thirteenth Amendment rights were not

III

Accordingly, we AFFIRM the district court's summary judgment.

REYNALDO G. GARZA, Circuit Judge, dissenting:

I believe that the original opinion of the panel that I was on, which can be found at 165 F.3d, 380 (5th Cir.1999), is sufficient to show that the seizure and handcuffing of Mrs. Atwater in this case was unreasonable and uncalled for.

I write separately in dissent because I believe that our colleagues in the majority are wrong in not dividing an arrest or a stop and a seizure of the person arrested or stopped.

We have of necessity to keep in mind that this was a traffic stop or arrest of Mrs. Atwater for failure to have her seatbelt or her children's seatbelts on when stopped. As pointed out by my colleague, Judge Parker, and author of the original opinion, Mrs. Atwater's seatbelt offense was a misdemeanor for which she could be fined up to $50 and no more. Her offense would in no way have been a danger to any one else, but herself and her children.

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violated, we do not reach the issue of qualified immunity."). Nor do we discuss the liability of the City of Lago Vista. *See Doe on Behalf of Doe v. Dallas Indep. Sch. Dist.*, 153 F.3d 211, 216 (5th Cir.1998) ("Thus, § 1983 municipal liability may be imposed when (1) the enforcement of a municipal policy or custom was (2) 'the moving force' of the violation of federally protected rights.") (quotations omitted)

I have been a Texas lawyer for over sixty years and an Article III Federal Judge in Texas for over thirty-eight years. I think that I can take judicial notice of the fact that in a regular traffic stop; when a person runs a red light, makes a wrong turn, is speeding, or in this case is not wearing a seatbelt, the usual procedure for the officer making the stop or the arrest is to give the accused a citation, which shows the charge against the person driving the car, a notice to appear before a municipal judge on a certain day at a certain time and signed by the accusing officer; which also adds a paragraph that is signed by the accused that they agree to appear on the date and time stated and that is the end of the story.

There are times when during a traffic stop an officer finds that the driver for instance, is driving while under the influence of either alcohol or drugs; the officer sees a gun on the seat of the car; the car smells of marihuana; the officer sees packages of cocaine or some other reason, like a check of the license number of the person stopped shows that the person is a fugitive or has another charge pending; in which case the officer that made the stop seizes the person and takes him or her to the police station to await being taken before a Magistrate, where the officer makes the complaint against the person and the Magistrate then sets a bond or refuses to allow one, whichever he chooses.

There is no evidence in our case that there was any reason for Mrs. Atwater to be seized and taken to the police station where she waited for an hour for a Magistrate to release her.

The majority setting aside the panel opinion makes no mention of an affidavit that is in the Record Excerpts of

appellants, Gail Atwater and her husband, on behalf of two of their children. The affidavit is that of Keith A. Campbell, who was a member of the Recruitment Unit of the Austin Police Department from August 1994 to March 1997. In the affidavit he makes mention of all the things he did when screening applicants for positions in the Austin Police Department. Mr. Campbell states he has reviewed the personnel file of Michael Barton Turek and he can state without reservation that he would not have recommended this individual to be hired by the Austin Police Department for the following reasons:

1. Lack of maturity based on his own explanations of changes in employment in the "reasons for leaving" sub-sections of each employer's identification.
2. Failed two of three reported psychological tests at A.P.D.
3. Failed to provide complete information.

Mr. Campbell's affidavit is an eye-opener of the kind of person Officer Turek, who saw fit to handcuff Mrs. Atwater behind her back for not wearing her seatbelt, is. Mrs. Atwater and her husband have sued the City of Lago Vista for its unreasonable hiring and lack of training of Turek.

Under Texas law, the City of Lago Vista is not responsible for the actions of their police officers unless they violate somebody's Constitutional Rights. Our colleagues in the majority seem to think that if an officer has probable cause to make a stop and an arrest it immunizes them to where they can do whatever they please. This approach is wrong because

in my view, probable cause will never immunize a constitutional violation.

Officer Turek had probable cause to stop the car that was being driven by Mrs. Atwater for failure to have her seatbelt on, but he should have given her a citation to appear instead of seizing her, putting handcuffs behind her back, and taking her to the police station. He would have taken her children with her except that a neighbor that came on the scene took the children to her home.

I strongly believe that my duty under the oath that I have taken, once as a United States District Judge, then as an Appellate Judge, is to uphold the Constitution and Laws of the United States. Under Article IV of the Amendments to the Constitution, the seizure is different then the stop and the arrest of Mrs. Atwater was unreasonable and therefore a violation of the Constitution of the United States. I cannot see why some of my colleagues are unwilling to say that the seizure by Officer Turek was unreasonable.

WIENER, Circuit Judge, dissenting:

Today a majority of this court announces that any full custodial arrest, replete with transportation to jail and booking, is *per se* a reasonable seizure within the meaning of the Fourth Amendment as long as the arresting officer has probable cause to believe that the individual being arrested has violated the law – any law, even an innocuous traffic ordinance. Not only does this holding ignore the Supreme Court's longstanding pronouncements that every Fourth Amendment analysis must turn on a tripartite balancing of individual interests, government interests, and the degree of

certainty that the government interest will be furthered by the search or seizure at issue, but it also turns a blind eye on the extreme facts of this case; facts that so clearly demonstrate an unreasonable seizure that those of my colleagues who concur in the majority opinion should have been tipped off that something must be critically awry with its reasoning. The result reached is so counterintuitive that it cries out for a deeper look. As the Fourth Amendment requires that every seizure must be effected pursuant to a legitimate governmental interest, and as the only conceivable reason for the full custodial arrest at issue here was Officer Turek's illegitimate desire to punish Atwater, I respectfully dissent.

I

When, as here, the facts virtually speak for themselves, it is disappointing – even if not surprising – that the majority opinion goes out of its way to sanitize them. The instant facts reveal that this case is not truly about a traffic stop followed by an arrest; it is about a police officer going to extreme lengths to satisfy a personal crusade or possibly even a vendetta. The evidence would allow a jury reasonably to infer that Officer Turek had been eagerly awaiting the opportunity to threaten, frighten, and humiliate Gail Atwater: Approximately two months prior to the incident in question, Officer Turek had pulled Atwater over for a putative seatbelt violation; however, much to his dismay, he had been forced to let her drive off without his issuing her a citation when he discovered that she and the other occupants of her car had their seatbelts securely fastened.

Officer Turek's frustration over this prior incident was made readily apparent from the very beginning of the traffic

stop and arrest that are now under review. When Atwater was pulled over this time, she was driving her two children, ages six and four, home from soccer practice. She was traveling in a residential neighborhood, on bone-dry streets, in broad daylight, and at a reasonable, lawful rate of speed. When Officer Turek observed that neither Atwater nor her children were wearing seatbelts, he proceeded to pull her car over. According to the testimony, Officer Turek approached Atwater's car and yelled at her in a belligerent and threatening manner, pointing his finger menacingly in Atwater's face and terrifying her and her young children. Officer Turek screamed that they had "had this conversation before" and that this time she (Atwater) was going to jail.

Officer Turek then ordered Atwater to produce her driver's license and proof of insurance. Atwater informed him that both documents had been in her purse when it was stolen two days earlier. She did, though, provided him with her license number and address from her checkbook. Despite the fact that Officer Turek had seen Atwater's driver's license and proof of insurance when he had pulled her over only weeks earlier, he proceeded to make good on his promise to take her to jail. First, he had her step out of her car; next, he handcuffed her behind her back; then he loaded her into the back of his squad car and took her to the police station; and there she was forced to remove her shoes and glasses, empty her pockets, and allow her "mug shot" to be taken. Finally, Atwater was placed in a jail cell and made to wait for approximately one hour before being produced before a magistrate.

II

The law is long and well established that, under the Fourth Amendment, the scope of a search or seizure "must be strictly tied to and justified by the circumstances which rendered its initiation permissible." *Terry v. Ohio*, 392 U.S. 1, 19, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968) (citation omitted). Implicit in this simple but forceful statement of the law – and explicit in its application by the Supreme Court to a broad panoply of cases – is the precept that the permissibility of any search or seizure depends on a balancing of (1) the government's purported interest in effecting the search or seizure, (2) discounted by the degree of certainty that the search or seizure will in fact further the government's interest, against (3) the extent of any infringement on the targeted individual's constitutionally protected privacy and liberty interests.[1]

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[1] Thus, the Supreme Court has held that the government's interest in protecting police officers is sufficient to justify a limited "stop and frisk" of an individual when supported by reasonable suspicion that the individual is carrying a weapon. *Terry*, 392 U.S. at 27, 88 S.Ct. 1868. But the same governmental interest is insufficient to justify the "wholly different kind of intrusion" involved in an arrest absent a greater degree of certainty – namely, probable cause – that the seizure will vindicate the governmental interest in question. *Id.* at 26, 88 S.Ct. 1868.

Similarly, although reasonable suspicion is sufficient to justify a "stop and frisk" for the purpose of protecting the police, the same quantum of certainty is insufficient to justify a "stop and frisk" for the less important and more generalized governmental interest in investigating and preventing crime. *Id.* at 22-23, 26-27,

The problem I perceive with the majority opinion is that its analysis focuses solely on the quantum of certainty involved in the case, to the exclusion of the other two relevant variables: the importance of the government's interest and the extent of the intrusion on the individual's liberty and privacy interests. This is all the more regrettable in light of the fact that quantum of certainty is not even at issue here: Atwater concedes that Officer Turek had probable cause to believe that she had broken the law by failing to wear a seatbelt. Indeed, Atwater further acknowledges that the government's interest in enforcing the traffic laws was sufficient to justify Officer Turek's decision, based on probable cause, to effect a traffic stop, and that the same interest would have justified his issuing her a citation. What Atwater vehemently denies, though, is that the government had any legitimate interest whatsoever – whether on the basis of reasonable suspicion, probable cause, or even absolute certainty – in effecting her

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88 S.Ct. 1868 (holding that a generalized interest in crime prevention justifies "approach[ing] a person for purposes of investigating possibly criminal behavior," but that it is "the more immediate interest of the police officer in taking steps to assure himself that the person with whom he is dealing is not armed with a weapon" that supplies the justification for the intrusion involved in a stop and frisk). The Supreme Court applied the same framework in *Tennessee v. Garner*, 471 U.S. 1, 105 S.Ct. 1694, 85 L.Ed.2d 1 (1985), when it held that the government's interest in enforcing the criminal laws is sufficient to justify an arrest that is supported by probable cause to believe that a suspect has committed a burglary, but that the government cannot employ the more extreme form of seizure involved in the use of deadly force absent the more important governmental interest of protecting the public from the threat of serious bodily harm.

full custodial arrest and transporting her to jail when the issuing of a citation would have fully protected and vindicated all of the government's interests.

"The Fourth Amendment proceeds as much by limitations upon the scope of governmental action as by imposing preconditions upon its initiation." *Id.* at 28-29, 88 S.Ct. 1868; *see also United States v. Place*, 462 U.S. 696, 707-08, 103 S.Ct. 2637, 77 L.Ed.2d 110 (1983). The mere fact that Officer Turek was justified in pulling Atwater over, and would have been justified in issuing her a citation, does not necessarily mean that he was justified in taking the far more intrusive step of effecting her full custodial arrest, complete with behind-the-back handcuffing, transporting to jail, and booking. "In justifying [a] particular intrusion [a] police officer must be able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion." *Terry*, 392 U.S. at 21, 88 S.Ct. 1868. In other words, to justify each successive, increasingly stringent intrusion on an individual's liberty and privacy interests, a police officer must at a minimum be able to articulate *some* reason why it was necessary to effect the further intrusion. The articulated reason does not need to be independent of the reasons that justify the initial intrusions: "The test is whether those interests are sufficiently substantial, not whether they are independent of the interest in investigating crimes effectively and apprehending suspects." *Place*, 462 U.S. at 704, 103 S.Ct. 2637. But if the identified reasons for both the initial and the successive intrusions are the same, a police officer must be able to advance a plausible claim that the initial intrusions were inadequate fully to serve

the proffered governmental interests.[2] If the officer cannot plausibly make that claim – in other words, if there were *no legitimate reasons* for the further intrusions – then the heightened intrusions are by definition "unreasonable."

I agree with the majority that the courts should avoid getting into the business of micro-managing arrests. I do not agree, however, that a jurisprudence that is faithful to the fundamental principles of the Fourth Amendment – and that thus would find a Fourth Amendment violation in the instant case – requires the courts to engage in such a practice. In the overwhelming majority of cases, when a police officer has probable cause to believe that an individual has violated or is violating the law, there are good and obvious reasons for that officer to arrest the individual. Examples of reasons that justify a police officer's effecting an arrest include risk of flight, *see United States v. Salerno*, 481 U.S. 739, 745, 107 S.Ct. 2095, 95 L.Ed.2d 697 (1987); need to interrogate an individual or search him for evidence, *see New York v. Harris*, 495 U.S. 14, 110 S.Ct. 1640, 109 L.Ed.2d 13 (1990); and need to protect the community from any threat that an individual poses to its safety, *see generally Bass v. Robinson*, 167 F.3d 1041, 1045 (6th Cir.1999); *Dunn v. Denk*, 79 F.3d

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[2] This is an objective standard rather than a subjective one. *See Whren v. United States*, 517 U.S. 806, 814, 116 S.Ct. 1769, 135 L.Ed.2d 89 (1996) ("[T]he Fourth Amendment's concern with 'reasonableness' allows certain actions to be taken in certain circumstances, whatever the subjective intent."). Thus, the question is not whether the police officer had a plausible reason in mind at the time of the arrest, but rather whether the facts, viewed objectively and from a distance, admit of a plausible reason justifying the arrest.

401, 408 (5th Cir.1996), *cert. denied*, 519 U.S. 813, 117 S.Ct. 61, 136 L.Ed.2d 23 (1996).

Clearly, none of these or other similar reasons are applicable to Officer Turek's arrest of Atwater. She is a local resident, well-known to Officer Turek. There is no indication that she posed even a minimal flight risk. The evidence amply demonstrates that she did not pose any threat to the officer or the community. And there was no need to conduct any further investigation, as the full extent of Atwater's violation of the seatbelt law had already been clearly ascertained. By this process of elimination, then, the one and only conclusion that can be reached on the evidence is that the sole reason Officer Turek arrested Atwater was his determination to inflict punishment on her, above and beyond the $50.00 fine prescribed by Texas law. Not only is the arresting officer's personal desire to punish a constitutionally illegitimate reason under the Fourth Amendment for effecting a seizure; it is also, at least potentially, an independent violation of the Fifth and Fourteenth Amendments, which permit the infliction of punishment only after a formal adjudication. *See Bell v. Wolfish*, 441 U.S. 520, 99 S.Ct. 1861, 60 L.Ed.2d 447 (1979); *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 83 S.Ct. 554, 9 L.Ed.2d 644 (1963); *Valencia v. Wiggins*, 981 F.2d 1440 (5th Cir.1993). Allowing Officer Turek to skate here gives the officer on the street carte blanche to be a one-person cop cum judge cum jury cum executioner: In effect, he can arrest, charge, try, convict, and both assess and inflict punishment.

The desire of the majority of my esteemed colleagues to arrive at a simple, bright-line rule that can be easily applied

by officers in the field is both understandable and laudable.[3] But such "a rigid all-or-nothing model of justification and regulation under the Amendment" ignores the complexity of real-world events and thus fails to remain faithful to the fundamental principles underlying the Fourth Amendment. *See Terry*, 392 U.S. at 17, 88 S.Ct. 1868. It also has the unfortunate effect of licensing the admittedly rare rogue patrol officer to inflict vigilante punishment on a citizen under the guise of an arrest – a state of affairs that the Constitution clearly does not tolerate.

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[3] The majority claims that its holding is mandated by language found in *Whren*, 517 U.S. at 818, 116 S.Ct. 1769 ("Where probable cause has existed, the only cases in which we have found it necessary actually to perform the 'balancing' analysis involved searches or seizures conducted in an extraordinary manner, unusually harmful to an individual's privacy or even physical interests"). Not only is this language dicta, however – the *Whren* court was assessing the validity of a traffic stop, not a full custodial arrest--but it arguably supports my position rather than the majority's. "Extraordinary" is defined in Webster's Dictionary as "going beyond what is usual, regular, or customary." WEBSTER'S SEVENTH NEW COLLEGIATE DICTIONARY 296 (1965). Of course, what qualifies as "usual, regular, or customary" is entirely dependent on the circumstances; an action that would be deemed an extraordinary response to one set of facts might be thought quite ordinary and commonplace if the facts were different. It need hardly be said that a full custodial arrest, complete with behind-the-back-handcuffing, transporting to jail, and booking, is an extraordinary response to a local mother's daytime seatbelt violation.

The rule that I would apply to this case has the virtue of being just as simple as the majority's, and thus just as easy for the police to apply in the myriad complex and confusing situations that they regularly encounter, without, however, jettisoning the fundamental principles embodied in the Fourth Amendment. Simply stated: Before a police officer can constitutionally place an individual under full custodial arrest, even with probable cause, the officer must have a plausible, articulable reason for effecting such an intrusion – a reason other than a desire on the part of the officer to punish the individual for his or her conduct.[4] This is hardly a burdensome imposition on the police; I cannot see any reason for the police to complain about having to articulate some manner of justification for the significant intrusion on Fourth Amendment privacy and liberty interests inherent in effecting any full custodial arrest.

Try as I may, I can discern no legitimate justification whatsoever for Officer Turek's lamentable decision to arrest, handcuff, transport, book, and jail Atwater; conversely, I see every indication that Officer Turek's sole purpose in doing so was unilaterally to inflict an illegitimate – and unconstitutional – punishment on her. For these reasons, I must respectfully dissent.

DENNIS, Circuit Judge, dissenting:

I respectfully dissent.

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[4] This is an objective standard, rather than a subjective one. *See supra* note 2.

The majority opinion does not address an important constitutional issue raised by this case, discussed extensively at oral argument, and fully considered by the en banc court: whether the Fourth Amendment, by incorporating the common law at the time it was framed, prohibits, as an unreasonable seizure, the warrantless full custodial arrest of an individual for a fine-only criminal misdemeanor that does not constitute or involve a breach of the peace.

The Supreme Court granted *certiorari* in order to consider this very issue in *Ricci v. Arlington Heights*, 116 F.3d 288 (7th Cir.1997), *cert. granted*, 522 U.S. 1038, 118 S.Ct. 679, 139 L.Ed.2d 627, *and cert. dismissed*, 523 U.S. 613, 118 S.Ct. 1693, 140 L.Ed.2d 789 (1998). However, after oral argument the writ of *certiorari* was dismissed as improvidently granted. *See Ricci v. Village of Arlington Heights*, 523 U.S. 613, 118 S.Ct. 1693, 140 L.Ed.2d 789 (1998). The Supreme Court oral argument transcripts in *Ricci* suggest that the Court dismissed *certiorari* as improvidently granted only because the Court learned for the first time at oral argument that the issue was not actually presented because Ricci's arrest had been based on the violation of a civil business license ordinance rather than a criminal misdemeanor offense. Oral Argument Before the Supreme Court of the United States (1998 WL 204590) at 57-64, *Ricci v. Arlington Heights*, 116 F.3d 288 (7th Cir.1997), *cert. granted*, 522 U.S. 1038, 118 S.Ct. 679, 139 L.Ed.2d 627, *and cert. dismissed*, 523 U.S. 613, 118 S.Ct. 1693, 140 L.Ed.2d 789 (1998) (No. 97- 501).

The district court's granting of the defendants' Rule 12(b)(6) and Rule 56 motions is reviewed *de novo* by this court of appeals. *See McConathy v. Dr. Pepper/Seven Up*

Corp., 131 F.3d 558 (5th Cir.1995) (failure to state a claim); *Montgomery v. Brookshire*, 34 F.3d 291, 294 (5th Cir.1994) (summary judgment). In accordance with Fed. R. App. P. 3 and 28, the appellant adequately noticed and argued to this court the issue of whether the warrantless full custodial arrest of a person for violation of a fine-only criminal misdemeanor seat-belt law, involving no breach of the peace, violates that person's Fourth Amendment rights.

The foregoing question of law is the only issue presented by this appeal. The district court concluded that the plaintiffs "have not provided evidence of any violation of a constitutional right, much less a violation of a clearly established constitutional right." The district court based its ruling primarily on the specific finding that the "only alleged 'force' and 'imprisonment' arose out [of] Turek's arrest of Atwater for the seat belt violations as clearly authorized by Texas law."

For purposes of the motion for summary judgment, the district court found that Turek, immediately upon stopping Atwater, yelled at her, "We've met before!" and "You're going to jail!" Based upon these findings and the evidence, it reasonably can be inferred that Turek initially placed Atwater in full custodial arrest based only on the seat belt violations and called for a back up to assist him in his seizure of Atwater, her children, and her vehicle. Consequently, this appeal does not raise the question of whether Turek constitutionally could have made a full custody arrest of Atwater for the additional charges he sometime later filed against her of failure to provide proof of insurance and failure to have her driver's license in her possession. Moreover, the failure to provide evidence of insurance or financial responsibility in itself is not a crime or

offense under Texas law. *See* TEX. TRANSP. CODE § 601.053 (West 1999); Op. Tex. Atty. Gen.1983, No. MW-577. The failure to carry or exhibit a driver's license is a fine-only, non-peace breaching misdemeanor, if, as in this case, it is not a third or subsequent conviction within one year after the date of the second such conviction. *See* TEX. TRANSP. CODE § 521.025. Finally, because Turek recently before had stopped Atwater and had examined her driver's license and evidence of insurance, there is a genuine factual dispute, not amenable to summary judgment, as to whether Turek had probable cause to file the additional charges against Atwater, which were summarily dismissed the same day by the magistrate.

I cannot join the majority opinion because it does not acknowledge or address the arguments in favor of the proposition that an unnecessary full custodial arrest of a person for a fine only criminal misdemeanor involving no breach of the peace is an unreasonable seizure against which the people have been guaranteed a right to be secure in their persons by the Fourth Amendment. Those arguments were set forth fully and very persuasively by the briefs of the petitioner and his amici in *Ricci*. *See, e.g.*, Petitioner's Brief (1998 WL 74152), Reply Brief of Petitioner (1998 WL 167353), Brief of the American Civil Liberties Union and the ACLU of Illinois in Support of Petitioner (1998 WL 77846), Brief of the National Association of Criminal Defense Lawyers as Amicus Curiae in Support of Petitioner (1998 WL 77850), Brief of the Institute for Justice as Amicus Curiae in Support of Petitioner (1998 WL 77847), *Ricci v. Arlington Heights*, 116 F.3d 288 (7th Cir.1997), *cert. granted*, 522 U.S. 1038, 118 S.Ct. 679, 139 L.Ed.2d 627, and *cert. dismissed*, 523 U.S. 613, 118 S.Ct. 1693, 140 L.Ed.2d 789 (1998) (No. 97- 501). In summary, I read the arguments to be as follows:

The Fourth Amendment provides that "[t]he right of the people to be secure in their persons . . . against unreasonable . . . seizures, shall not be violated[.]" When determining whether a particular governmental action violates the Fourth Amendment, the Supreme Court has said that the first inquiry is whether the action was regarded as an unlawful search or seizure under the common law when the amendment was framed. *See Wyoming v. Houghton*, 526 U.S. 295, 119 S.Ct. 1297, 1300, 143 L.Ed.2d 408 (1999) (citing *Wilson v. Arkansas*, 514 U.S. 927, 931, 115 S.Ct. 1914, 131 L.Ed.2d 976 (1995); *California v. Hodari D.*, 499 U.S. 621, 624, 111 S.Ct. 1547, 113 L.Ed.2d 690 (1991)). "Where that inquiry yields no answer, we must evaluate the search or seizure under traditional standards of reasonableness by assessing, on the one hand, the degree to which it intrudes upon an individual's privacy and, on the other, the degree to which it is needed for the promotion of legitimate interests." *Houghton*, 119 S.Ct. at 1300 (citing, *e.g., Vernonia School Dist. 47J v. Acton*, 515 U.S. 646, 652-53, 115 S.Ct. 2386, 132 L.Ed.2d 564 (1995)).

The common law prohibited the warrantless arrest of an individual for a misdemeanor unless it involved a breach of the peace. As the Supreme Court in *Carroll v. United States*, 267 U.S. 132, 156, 45 S.Ct. 280, 69 L.Ed. 543 (1925) stated:

> "In cases of misdemeanor, a peace officer like a private person has at common law no power of arresting without a warrant except when a breach of the peace has been committed in his presence or there is reasonable ground for supposing that a breach of peace is about to be committed or renewed in his presence."

> Halsbury's Laws of England, vol. 9, part. III, 612.
> The reason for arrest for misdemeanors without warrant at common law was promptly to suppress breaches of the peace (1 Stephen, History of Criminal Law, 193), while the reason for arrest without warrant on a reliable report of a felony was because the public safety and the due apprehension of criminals charged with heinous offenses required that such arrests should be made at once without warrant (Rohan v. Sawin, 5 Cush. [Mass.] 281).

While the term "peace of the king" at common law meant, in one sense, the "law and sovereignty" of the king in general, with regard to a peace officer's power of arrest the term denoted "some violent or disorderly act causing public alarm or disturbance. . . ." 2 ENCYCLOPEDIA OF THE LAWS OF ENGLAND 436-37 (E.A. Jelf ed., 3d ed.1938). The misdemeanors for which common law allowed custodial arrest were serious offenses, including assaults and other dangerous and disruptive acts, or public disturbances. *See* Horace L. Wilgus, *Arrest Without a Warrant*, 22 MICH. L. REV. 541, 572-77 (1923-24).

Applied to the case at hand, it seems evident that the failure to buckle a seat-belt hardly conjures up images of the "violent or disorderly acts" contemplated by the common law as warranting a full custodial arrest. *See* SIR WILLIAM BLACKSTONE, BLACKSTONE'S COMMENTARIES ON THE LAW 811 (Bernard C. Gavit ed. 1892) (listing offenses against the public peace as riotous assemblages, unlawful hunting, threatening letters, destruction of locks or flood-gates, and affrays). Gail

Atwater's infraction of the Texas fine-only criminal misdemeanor seat-belt law did not constitute or portend any disturbance that would even approach a breach of the peace under the common law when the Fourth Amendment was framed. Therefore, the initial inquiry required by the Supreme Court's decisions yields the answer that Turek's full custodial arrest of Atwater for that infraction violated her right under the Fourth Amendment to be secure in her person against unreasonable seizures.

Even if the historical evidence were thought to be equivocal, *see Houghton*, 119 S.Ct. at 1302, the panel opinion in this case demonstrates that the balancing of the relative interests weighs decidedly in favor of protecting the personal privacy and personal dignity of an individual from an intrusion that must surely be an annoying, frightening, and humiliating experience. *See Atwater v. City of Lago Vista*, 165 F.3d 380 (5th Cir.1999). In this case in which there is substantial and perhaps conclusive evidence that the governmental action would have been regarded as an unlawful search or seizure under the common law when the amendment was framed, the panel opinion also is very persuasive in its evaluation of the seizure under the traditional standards of reasonableness and its conclusion that the degree to which the seizure intrudes upon an individual's privacy and dignity undoubtedly outweighs the degree to which it is needed for the promotion of legitimate governmental interests. *Id.*

The majority opinion affirms the district court's summary judgment without undertaking the first or the second inquiry demanded of us by the Fourth Amendment and the Supreme Court's decisions in *Wyoming v. Houghton*, 526 U.S. 295, 119 S.Ct. 1297, 143 L.Ed.2d 408 (1999), *Wilson v.*

Arkansas, 514 U.S. 927, 115 S.Ct. 1914, 131 L.Ed.2d 976 (1995) and *California v. Hodari D.*, 499 U.S. 621, 111 S.Ct. 1547, 113 L.Ed.2d 690 (1991). The Supreme Court's reaffirmation of our duty to make these inquiries subsequent to its decision in *Whren v. United States*, 517 U.S. 806, 116 S.Ct. 1769, 135 L.Ed.2d 89 (1996), and the Supreme Court's recent willingness to examine the issue of warrantless custodial arrests for peace - breachless fine - only misdemeanors in *Ricci v. Arlington Heights*, 116 F.3d 288 (7th Cir.1997), *cert. granted*, 522 U.S. 1038, 118 S.Ct. 679, 139 L.Ed.2d 627, *and cert. dismissed*, 523 U.S. 613, 118 S.Ct. 1693, 140 L.Ed.2d 789 (1998), convinces me that the majority is mistaken in assuming that our obligation to carefully scrutinize intrusions upon the right of the people to be secure in their persons has been totally displaced by a simple *Whren* probable cause matrix. Accordingly, because the majority used an inappropriate truncated analysis to reach what appears to be an incorrect result, I respectfully dissent.

APPENDIX B

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

[Filed January 29, 1999]

No. 98-50302

Gail ATWATER, Individually; Michael Haas, Dr., As next friend of Anya Savannah Haas and Mackinley Xavier Haas, *Plaintiffs-Appellants*,	)
v.	)
CITY OF LAGO VISTA, Bart Turek, and Frank Miller, Chief of Police, Lago Vista, *Defendants-Appellees*.	)

OPINION

Before REYNALDO G. GARZA, STEWART and PARKER, Circuit Judges.

ROBERT M. PARKER, Circuit Judge:

Appellants Gail Atwater and Michael Haas, as next friend of Anya Savannah Haas and Mackinley Xavier Haas, appeal the decision of the district court granting defendants, City of Lago Vista, Bart Turek, and Frank Miller, summary judgment. Finding error, we reverse in part and remand.

BACKGROUND

Gail Atwater and her family are long-term residents of Lago Vista, Texas, a suburb of Austin. She is a full-time mother and her husband is an emergency room physician at a local hospital. On the pleasant spring afternoon of March 26, 1997, as Gail Atwater was driving her children home after their soccer practice at 15 miles per hour through her residential neighborhood, she violated Section 545.413 of the Texas Transportation Code. Neither Gail Atwater, her four-year-old son nor her six-year-old daughter were wearing their seat belts. Detecting this breach of the peace and dignity of the state, Lago Vista police officer, Bart Turek, set about to protect the community from the perpetration of such a crime. In doing so, he brought to bear the full panoply of means available to accomplish his goal - verbal abuse, handcuffs, placing Gail Atwater under custodial arrest, and hauling her to the local police station. It was not a proud moment for the City of Lago Vista.

When Officer Turek pulled over Atwater's pickup, she and her children remained in the vehicle. Officer Turek approached the driver's side window and aggressively jabbed his finger toward her face. Turek screamed either that they had met before or had this conversation before. Turek's conduct frightened her children, so Atwater calmly and in a normal tone requested that Turek lower his voice. According

to Atwater, the request that Turek lower his voice further triggered his wrath. Turek responded immediately by telling Atwater that she was going to jail. Atwater remained calm. Atwater was not acting suspiciously, she did not pose any threat to Turek, and she was not engaged in any illegal conduct other than failing to wear a seat belt when Turek told her she was going to jail.

Turek continued to speak to Atwater in a verbally abusive manner, accusing her of not caring for her children. Atwater's children and bystanders including friends and other Lago Vista residents who drove or walked by witnessed Turek's tirade. Turek stated that he recently stopped Atwater for not having her children in seat belts, but such was not the case. Turek had in fact stopped her several months before for allowing her son to ride on the front seat arm rest, but the seat belt was securely fastened. No citation was issued.

After telling Atwater that she would be taken to jail, Turek demanded her driver's license and proof of insurance. When Atwater informed Turek that her license and insurance card were in her purse that had been stolen a couple of days before, Turek ridiculed her and implied she was a liar, even though, assuming he followed standard procedures during the previous stop, he knew she had a valid driver's license and was an insured driver. Atwater eventually provided her driver's license number and address from her check book. Atwater then asked Turek to allow her to take her children to a friend's home just two houses down before taking her to jail, but he refused her request. Turek stated that her children could accompany her to the police station. Fortunately, a friend of Atwater's who came to the scene took the children into her care.

Although under Texas law Turek could have issued Atwater a traffic citation if she signed a promise to appear,[1] he instead chose to handcuff Atwater with her hands behind her back, load her into his squad car, and take her to the police station. Once at the police station, Atwater was required to remove her shoes and glasses, empty her pockets and have her picture taken. She was then placed in a jail cell for approximately one hour before being taken before a magistrate.

Atwater pleaded no contest to not wearing a seat belt and allowing her children to not wear seat belts. Charges of driving without a license or proof of insurance were dismissed. This incident caused Atwater and her children extreme emotional distress and anxiety. Her youngest child has required counseling, and Atwater has been prescribed medication for nightmares, insomnia, and depression resulting from this incident.

Frank Miller, the chief of police for Lago Vista, was the ultimate authority in the police department in the areas of management of department personnel. Lago Vista's policy for enforcement of traffic violations allows for the use of custodial arrests to promote its goals of increased traffic ordinance compliance. The policy specifically leaves to the officer's judgment whether to take a motorist into custody for violations of a traffic ordinance, and according to Appellants, encourages the very conduct engaged in by Officer Turek.

Atwater and her husband, as next friend for her children, brought suit against the City of Lago Vista, Police

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[1] *See* TEX. TRANSP. CODE ANN. § 543.005

Chief Miller, and Officer Turek under 42 U.S.C. § 1983 and § 1985 alleging *inter alia* violations of Atwater's Fourth Amendment rights to be free from unreasonable seizures and excessive force and punishment as well as her right to due process under the Fifth and Fourteenth Amendments. Atwater also brought state law claims for false imprisonment and intentional infliction of emotional distress. A claim for intentional infliction of emotional distress was brought on behalf of her children.

The defendants filed a Rule 12(b)(6) motion to dismiss, or alternatively, a motion for summary judgment based in part on qualified immunity. The district court granted summary judgment holding that the plaintiffs had not identified a constitutional right that had been violated and that the individual defendants had not acted in an objectively unreasonable manner. With respect to the Fourth Amendment unreasonable seizure claim, the district court found that the plaintiffs failed to state a claim. With respect to the claims against the municipality, the district court found that although the plaintiffs proved "policy or custom" they failed to offer evidence of an underlying unconstitutional activity. The district court also granted summary judgment on the state law claims. Atwater and her children timely appeal.

ANALYSIS

We review the grant of summary judgment *de novo* applying the same standard as the district court. *See Ellison v. Connor*, 153 F.3d 247, 251 (5th Cir.1998). For purposes of summary judgment, the court considers the evidence of the nonmovant plaintiffs as true and draws all inferences in the

nonmovants' favor. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986).

I. *FAILURE TO STATE A CLAIM*

With respect to Appellants' Fourth Amendment unreasonable seizure claim, the district court concluded that the Appellants failed to state a claim because they did "not allege with any particularity what conduct violated what provision of the Constitution." Order of February 13, 1998, p. 5. This conclusion of the learned district judge misses the mark. Appellants' First Amended Petition alleged facts to support an unreasonable seizure claim under the Fourth Amendment. Appellants alleged that Officer Bart Turek stopped Atwater for not wearing a seat belt and not having her children properly seatbelted in the vehicle. Appellants further alleged that Officer Turek began yelling at her, telling her she was going to jail. According to Appellants, Officer Turek then continued to abuse her verbally, handcuffed her, and took her to jail, for a mere seat belt violation. Appellants alleged that this constituted an unreasonable seizure under the Fourth Amendment. *See* First Amended Petition, p. 11. We find that facts were alleged with sufficient particularity to state a claim under the Fourth Amendment.

II. *QUALIFIED IMMUNITY AND OFFICER TUREK*[2]

Although the district court dismissed Appellants' Fourth Amendment claim for failure to state a claim, the Appellees presented an argument on summary judgment that the individual defendants were also entitled to qualified immunity. *See* Rule 12(b)(6) Motion for Dismissal, Or, In the Alternative, Rule 56 Motion and Brief for Summary Judgment, p. 19. Although it appears that this section of the summary judgment brief focuses only on the qualified immunity defense of Chief Miller and never mentions Officer Turek by name, portions of the brief do allude to the "individual defendants," which ostensibly includes Officer Turek. We shall give Appellees the benefit of the doubt that they were asserting qualified immunity on behalf of both Chief Miller and Officer Turek.

Determining whether an official is entitled to qualified immunity is a two-step process requiring the court to determine (1) whether the plaintiff has alleged a violation of a clearly established constitutional right and (2) whether the official's conduct was objectively reasonable in light of clearly established law as it existed at the time of the conduct in question. *See Stefanoff v. Hays County*, 154 F.3d 523, 525 (5th Cir.1998). Although Atwater concedes that Turek had probable cause to stop her for failure to wear a seat belt, Atwater challenges the reasonableness under the Fourth

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[2] We discuss only the issue of the Fourth Amendment unreasonable seizure claim because it is the claim which the court considers to have merit. The judgment of the district court on the other claims asserted by Appellants will be affirmed.

Amendment of her arrest for violation of the Texas seat belt law.

A. Clearly Established Law

The way one states the legal principle which must be clearly established before liability can attach is oftentimes outcome-determinative. In that vein, the defendants point out that no case exists which calls Officer Turek's actions into question; thus no clearly established law exists. Indeed we have found no case where a court was asked to consider an officer's action of arresting, handcuffing, booking, and holding a first-time seat belt violator in jail. But that does not conclude the inquiry. The paucity of similar factual scenarios that have found their way into published legal opinions may be attributable to law officers acting in a more responsible and professional manner than Bart Turek acted on this occasion. Or in those instances where similar abuses took place, perhaps the victims either were without the resources to call the officer's hand or chose to avoid further involvement with a justice system so lacking in common sense and reasonableness.

The Fourth Amendment provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

It has long been clearly established that there is a constitutional right to be free from unreasonable seizures. *See, e.g., Brower v. County of Inyo*, 489 U.S. 593, 109 S.Ct. 1378, 103 L.Ed.2d 628 (1989); *Steagald v. United States*, 451 U.S. 204, 101 S.Ct. 1642, 68 L.Ed.2d 38 (1981); *Terry v. Ohio*, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968). Further, it is clearly established that even where there is probable cause to believe an offense has been committed, any seizure which is conducted in an extraordinary manner or which constitutes an extreme practice must meet the reasonableness requirement of the Fourth Amendment.[3] *See, e.g., Tennessee v. Garner*, 471 U.S. 1, 105 S.Ct. 1694, 85 L.Ed.2d 1 (1985) (finding that when an arrest requires the use of deadly force, probable cause is not sufficient and the means for the arrest must be reasonable); *Welsh v. Wisconsin*, 466 U.S. 740, 104 S.Ct. 2091, 80 L.Ed.2d 732 (1984) (holding that warrantless arrest of a suspect in his home for a traffic offense was unreasonable); *New York v. Payton*, 445 U.S. 573, 585, 100 S.Ct. 1371, 63 L.Ed.2d 639 (1980) ("the warrantless arrest of a person is a species of seizure required by the [Fourth] Amendment to be reasonable"); *Jones v. United States*, 357 U.S. 493, 78 S.Ct. 1253, 2 L.Ed.2d 1514 (1958) (probable cause insufficient for warrantless arrest in farmhouse at night).

B. Objective Reasonableness

The Texas seat belt law is one of a number of paternalistic statutes enacted by the Texas Legislature, the violation of which usually exposes the offender to the

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[3] *See Whren v. United States*, 517 U.S. 806, 818, 116 S.Ct. 1769, 135 L.Ed.2d 89 (1996), and discussion *infra*.

imposition of a fine. *See, e.g.*, Tex. Trans. Code Ann. § 545.413 (requiring the driver, front-seat passenger, and children from ages four to fifteen to wear a seat belt); Tex. Trans. Code Ann. § 545.414 (prohibiting a child under twelve years of age to ride in the open-bed of a pickup truck); Tex. Trans. Code Ann. § 545.419 (prohibiting a person from occupying a house trailer while it is being moved); Tex. Parks & Wildlife Code Ann. § 31.066 (requiring life preservers on motorboats and requiring passengers under 13 years of age to wear life preservers). We refer to these laws as paternalistic because they are designed to protect a specific individual from his own conduct, conduct which poses no threat to the public at large. We contrast these paternalistic statutes with most traffic laws, the violation of which can have an immediate impact on other users of streets and roadways. *See, e.g.*, Tex. Penal Code Ann. § 49.04 (prohibiting the operation of a motor vehicle while intoxicated); Tex. Trans. Code Ann. § 545.351-352 (requiring motorists to drive within speed limits); Tex. Trans. Code Ann. § 545.401 (prohibiting reckless driving); Tex. Trans. Code Ann. § 545.104 (requiring the use of turn signals). In order to determine the objective reasonableness of Officer Turek's actions we must understand the nature of the offense involved and who the law is designed to protect because that helps us weigh the governmental interest in arresting a violator versus the individual's privacy interest under the Fourth Amendment.

Atwater's operation of a motor vehicle without wearing a seat belt and without her children wearing a seat belt in the front seat was a violation of § 545.413 of the Texas Transportation Code. Violation of the Texas Seat Belt Law is a "misdemeanor punishable by a fine of not less than $25 or more than $50." Tex. Trans. Code Ann. § 545.413(d). No

jail term is provided in the statute. Under the Texas Code an officer has the discretion to allow a motorist to secure release upon arrest by making a written promise to appear in court. *See* Tex. Trans. Code Ann. § 543.005. Once a motorist provides a written promise to appear by signing the citation, an officer is required to promptly release the motorist. *See id.* Section 543.001 of the Texas Transportation Code provides that: "Any peace officer may arrest without warrant a person found committing a violation of this subtitle." However, any decision to arrest and the circumstances surrounding the arrest must be considered within the confines of the Fourth Amendment.

Although the statute provides that persons "may" be arrested for seat belt violations, it does not provide that in all circumstances an arrest is appropriate. Certainly a statute which authorizes arrest for a mere seat belt violation in every instance would be subject to a Fourth Amendment challenge.

In *Tennessee v. Garner*, 471 U.S. 1, 105 S.Ct. 1694, 85 L.Ed.2d 1 (1985), the Supreme Court held that the use of deadly force to apprehend a fleeing suspect who did not appear to be armed or otherwise dangerous violated the suspect's constitutional rights, notwithstanding the existence of probable cause to arrest. In reaching this conclusion, the Court explained that "[t]o determine the constitutionality of a seizure 'we must balance the nature and quality of the intrusion on the individual's Fourth Amendment interests against the importance of the governmental interests alleged to justify the intrusion.'" *Id.* at 8, 105 S.Ct. 1694 (citations omitted). That "reasonableness depends on not only when a seizure is made, but also how it is carried out." *Id.* The Supreme Court's Fourth Amendment jurisprudence makes clear that in

determining reasonableness, we must ask "whether the totality of the circumstances justified a particular sort of search or seizure." *Id*. 8-9, 105 S.Ct. 1694.

Appellees argue that Officer Turek's actions were justified because he had probable cause [4] to believe a seat belt violation had occurred, and the Texas statute authorized the arrest. It is not that simple. Officer Turek cannot hide behind the Texas seat belt law to legitimate his actions. Most recently in *Knowles v. Iowa*, --- U.S. ----, 119 S.Ct. 484, ---- L.Ed.2d ---- (1998), the Supreme Court examined the question of whether a search incident to traffic citation authorized by Iowa law nonetheless violated the Fourth Amendment. Implicit in the Court's decision that the actions of the officer violated the Fourth Amendment is the realization that the existence of the Iowa statute did not obviate the need for an independent Fourth Amendment analysis. "Where a statute authorizes official conduct which is patently violative of fundamental constitutional principles, an officer who enforces that statute is not entitled to qualified immunity." *Grossman v. City of Portland*, 33 F.3d 1200, 1209 (9th Cir.1994). Defendants' reading of the Texas Seat Belt Law would be patently violative of the Fourth Amendment because it would read the reasonableness requirement out of the Amendment.

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[4] Probable cause occurs when the facts and circumstances within an officer's knowledge are sufficient to warrant a prudent man in believing that a person committed or was committing an offense. *See Beck v. Ohio*, 379 U.S. 89, 91, 85 S.Ct. 223, 13 L.Ed.2d 142 (1964).

However, it is a cardinal principle that courts will construe a statute to avoid a constitutional problem. *See Edward J. DeBartolo Corp. v. Florida Gulf Coast Building & Construction Trades Council*, 485 U.S. 568, 108 S.Ct. 1392, 99 L.Ed.2d 645 (1988); *Crowell v. Benson*, 285 U.S. 22, 52 S.Ct. 285, 76 L.Ed. 598 (1932). In doing so, we do not interpret the Texas statute to authorize arrest in every instance. To the contrary, the statute necessarily requires the exercise of discretion in the decision to arrest or not–reasonableness being the key in exercising that discretion.

At common law the general rule was:

> In cases of misdemeanor, a peace officer like a private person has at common law no power of arresting without a warrant except when a breach of the peace has been committed in his presence or there is reasonable ground for supposing that a breach of peace is about to be committed or renewed in his presence.

Carroll v. United States, 267 U.S. 132, 157, 45 S.Ct. 280, 69 L.Ed. 543 (1925) (quoting Halsbury's Laws of England, vol. 9, part. III, 612). Early common law prohibited arrest for very minor offenses. *See* Barbara C. Salken, The General Warrant of the Twentieth Century? A Fourth Amendment Solution to Unchecked Discretion to Arrest for Traffic Offenses, 62 TEMP. L. REV. 221, 258- 59 (1989) (citing W. Paley, THE LAW AND PRACTICE OF SUMMARY CONVICTIONS 19 (London 1814)).

Although the Fourth Amendment and common law do not always coincide, the Supreme Court has recognized the

logic of distinguishing between minor and serious offenses in evaluating the reasonableness of a seizure under the Fourth Amendment. Indeed, this is not a novel idea. *See Gustafson v. Florida*, 414 U.S. 260, 266-67, 94 S.Ct. 488, 38 L.Ed.2d 456 (1973) (Stewart, J., concurring) ("It seems to me that a persuasive claim might have been made in this case that the custodial arrest of the petitioner for a minor traffic offense violated his rights under the Fourth and Fourteenth Amendments"). In *Welsh v. Wisconsin*, 466 U.S. 740, 104 S.Ct. 2091, 80 L.Ed.2d 732 (1984), police officers arrived at the scene of a traffic accident and obtained information indicating that the driver of the automobile involved was guilty of a first offense of driving while intoxicated. The driver left the scene of the accident, and the officers followed the suspect to his home where they arrested him without a warrant. Absent exigent circumstances, the warrantless invasion of the home was a clear violation of *Payton v. New York*, 445 U.S. 573, 100 S.Ct. 1371, 63 L.Ed.2d 639 (1980). In holding that the warrantless arrest for a traffic offense was unconstitutional the Court stated:

> When the government's interest is only to arrest for a minor offense, . . . the government usually should be allowed to make such arrests only with a warrant issued upon probable cause by a neutral and detached magistrate.

Welsh, 466 U.S. at 750, 104 S.Ct. 2091. In this case, had Officer Turek gone to a magistrate, undoubtedly no arrest warrant would have been issued.[5]

Even Justice White, in dissenting in *Welsh* stated:

> The gravity of the underlying offense is, I concede, a factor to be considered in determining whether the delay that attends the warrant-issuance process will endanger officers or other persons. The seriousness of the offense with which a suspect may be charged also bears on the likelihood that he will flee and escape apprehension if not arrested immediately.

466 U.S. at 759, 104 S.Ct. 2091. In this case there is not the slightest hint of exigent circumstances.

Appellees urge this court to recognize the significant body of authority which appears to indicate that all seizures are reasonable under the Fourth Amendment if based upon probable cause. *See, e.g., United States v. Watson*, 423 U.S. 411, 96 S.Ct. 820, 46 L.Ed.2d 598 (1976) (where the arrest

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[5] Justice Jackson writing in concurrence in *McDonald v. United States*, 335 U.S. 451, 459-60, 69 S.Ct. 191, 93 L.Ed. 153 (1948), explained his view about warrantless home arrests for minor offenses: "When an officer undertakes to act as his own magistrate, he ought to be in a position to justify it by pointing to some real immediate and serious consequences if he postponed action to get a warrant."

for a felony occurring in a public place during the daytime required only probable cause to be constitutional). ***But see*** 3 Wayne R. LaFave, SEARCH AND SEIZURE § 5.1(b) (3d ed.1996) (criticizing *Watson* as remarkable for its lack of analysis); *see also Beck v. Ohio*, 379 U.S. 89, 91, 85 S.Ct. 223, 13 L.Ed.2d 142 (1964) (noting that the constitutional validity of an arrest turns upon whether the officer had probable cause to make the arrest). Once again, this is an oversimplification of the status of our Fourth Amendment jurisprudence. Most recently, in *Whren v. United States*, 517 U.S. 806, 817-18, 116 S.Ct. 1769, 135 L.Ed.2d 89 (1996), the Supreme Court explained that although the general rule is that the "reasonableness" of a search or seizure is not in doubt where the search or seizure is based upon probable cause, a balancing of all relevant factors is necessary under the Fourth Amendment when the search or seizure is conducted in an "extraordinary manner" or constitutes an "extreme practice." *Id.* The Court cited *Tennessee v. Garner* and *Welsh v. Wisconsin*, among others, as examples of seizures conducted in an extraordinary manner, i.e., "unusually harmful to an individual's privacy or even physical interests." *Whren*, 517 U.S. at 818, 116 S.Ct. 1769.

In *Whren*, the Court faced the issue of whether a temporary detention of a motorist based upon probable cause that he violated a traffic law was unconstitutional under the Fourth Amendment. The Court concluded that a traffic stop by an out-of-uniform officer did not rise to the level of an extreme practice to warrant the reasonableness analysis employed in cases where a seizure was conducted in an extraordinary manner. *See id.* This is in keeping with the Supreme Court's observation that traffic stops are generally brief in nature and not as invasive as other forms of seizure. *See, e.g., Berkemer*

v. McCarty, 468 U.S. 420, 439 n. 29, 104 S.Ct. 3138, 82 L.Ed.2d 317 (1984).

In light of the Supreme Court precedent clearly established prior to the incident in question, particularly the Supreme Court's explanation in *Whren*, we easily conclude that an arrest for a first-time seat belt offense is indeed an extreme practice and a seizure conducted in an extraordinary manner which requires a balancing analysis to determine the reasonableness of the police activity. In conducting the analysis, we observe that the only possible governmental interest in arresting Atwater for the seat belt offense was enforcement of the seat belt law. Atwater did not pose a threat to the officer's safety; she was not a flight risk; and upon release she would not have posed a danger to society. Atwater was not a repeat offender. The seat belt law could have been enforced equally well through the issuance of a citation. With respect to the method of arrest, there was no good reason for Atwater to be handcuffed behind her back. Upon conducting a balancing test of all relevant factors, we find no factors existing in this case that are appropriate for placement on the side of the scales that would tilt them in favor of seizure. The seizure was objectively unreasonable.

Appellees' citation of *United States v. Robinson*, 414 U.S. 218, 94 S.Ct. 467, 38 L.Ed.2d 427 (1973), is unavailing. In *Robinson*, the parties never challenged the constitutionality of the arrest. *See id.* at 221-22, 94 S.Ct. 467. The challenge in *Robinson* was whether a search incident to a valid arrest following a traffic violation was unconstitutional.

Our research reveals that every case in Texas wherein an individual was custodially arrested after violating the seat

belt law, the arrest ensued only after some additional conduct occurred or some additional factor justifying arrest was revealed. *See, e.g., Madison v. State*, 922 S.W.2d 610 (Tex.App-Texarkana 1996, writ ref'd). In *Madison*, after stopping a driver for failure to wear a seat belt, the officer observed that the inspection sticker on the vehicle had expired more than two years earlier, and after performing a license and registration check, the officer discovered that driver had a felony record. The driver was then arrested and cocaine was discovered during an inventory search. *See also Valencia v. State*, 820 S.W.2d 397 (Tex.App.-Houston [14th Dist.] 1991, writ ref'd). In *Valencia*, officers observed a van blocking the street which drove away as they approached. The officers followed the van and observed it swerving from side to side and into the path of oncoming traffic. The officers stopped the van, noted that the driver appeared to be intoxicated and arrested the driver. The officers observed that the passenger was not wearing a seat belt, that he continually moved his hands despite admonitions to keep his hands where the officers could see them, and that the passenger had no identification. The passenger was arrested and a search of the passenger revealed a large amount of cash and a number of baggies containing what appeared to be cocaine. These cases do not support the proposition that a first-time offender for a seat belt violation should be arrested, handcuffed and hauled to jail.

If we consider Atwater's evidence as true and draw all reasonable inferences in her favor, as we must do on summary judgment,[6] then she has established that Officer Turek's

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[6] *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. at 255, 106 S.Ct. 2505.

conduct was objectively unreasonable under the Fourth Amendment. Atwater maintains that she was placed under arrest immediately for failing to wear a seat belt. Atwater attests that Turek came at her screaming and verbally abusing her; i.e., his mind was made up before he could find out why the violation occurred. According to Atwater, Turek told her she would be taken to jail almost as soon as he got to her truck. The timing is important.

It is important also to note that in this case Atwater did not refuse to buckle her seat belt or her children's seat belts upon being stopped by Officer Turek. There was no reason to seize her because she was a serious repeat offender. According to Atwater, the previous time Officer Turek stopped her, her son was riding on the arm rest of her truck, but was wearing a seat belt. No citation was issued during this previous stop. Further, Atwater was no flight risk. Officer Turek knew she lived in the neighborhood as he recognized her from the previous stop. She posed no threat to the officer or to others. The only reason to arrest Atwater instead of issuing her a citation under these circumstances was to harass and impose a level of punishment beyond the limitations of the statute. We cannot countenance such abuse from an officer of the law.

Gail Atwater became the victim of an over-zealous police officer who abused the power entrusted to him by the City of Lago Vista.[7] This case serves to remind us that "the

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[7] In expressing disdain at overzealous police activity, our colleague Judge Reavley said in *Morgan v. City of DeSoto*, 900 F.2d 811 (5th Cir.1990), a case where high school students were arrested, handcuffed, and taken to jail because they were

central concern of the Fourth Amendment is to protect liberty and privacy from arbitrary and oppressive interference by government officials." *United States v. Ortiz*, 422 U.S. 891, 895, 95 S.Ct. 2585, 45 L.Ed.2d 623 (1975) (citations omitted). It also presents fundamental questions about the status of Fourth Amendment rights and the lines society is willing to draw concerning the conduct of police officers, the vast majority of whom dutifully carry out their obligations within constitutional limits.

It is also incumbent upon us to place this case into proper perspective. It is and should be the rare case indeed where an individual is placed under arrest for nothing more

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congregating on shopping center parking lots after hours, creating a litter problem:

> Regardless of the visibility of the signs, regardless of whether a class B misdemeanor (criminal trespass) was committed, regardless of whether the officers had a probable cause to arrest, and regardless of how bad a litter problem the shopping centers were having, we can find no explanation for taking every high school student found on the parking lot under any circumstances and arresting them, handcuffing them, and keeping them in jail for the night as if they were threats to society. Whatever the legal points and the liability, how can any party deny that the criminal justice system operated here as an instrument of oppression?

Id. at 814.

than a seat belt violation. However, this decision in no way impacts the plethora of authority justifying brief traffic stops for minor traffic violations. *See, e.g., Whren v. United States*, 517 U.S. 806, 116 S.Ct. 1769, 135 L.Ed.2d 89 (1996). This decision is limited to its facts. Appellees argue that Officer Turek's actions were justified because he had probable cause to believe a seat belt violation occurred. While we agree that traffic violations can become a serious matter affecting public safety, we cannot agree that the seat belt violation in this case was so dangerous or so serious as to justify arrest.[8] As previously discussed, a seat belt violation affects only the passengers and operator of the vehicle in question. Although the Texas Legislature has decided, and we do not dispute, that the interest in protecting these individuals is an important one, the governmental interest in arresting an individual for a seat belt violation is much less than in the case of other traffic violations which can have an immediate impact on the public at large.

Officer Turek's actions, in this case, under these facts, were constitutionally unreasonable; indeed they were indefensible. He is not, therefore, entitled to qualified immunity.

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[8] We do not address whether the Texas seat belt law is facially constitutional, for no such challenge was presented. This case presents an as-applied challenge. For a discussion on the need for laws mandating use of citation as opposed to arrest to enforce minor traffic laws, see Wayne R. LaFave, 3 SEARCH AND SEIZURE § 5.1(h) (3d ed.1996).

III. *MUNICIPALITY LIABILITY*

Because summary judgment for the municipality was based on failure to identify a constitutional right which had been violated by Officer Turek, that judgment also must be reversed with respect to a Fourth Amendment claim alleging unreasonable seizure.

IV. *LIABILITY OF CHIEF MILLER*

Upon review of the summary judgment record, we fail to see any evidence or argument showing that Chief Miller should be liable on any of Appellants' claims or that he would otherwise not be entitled to qualified immunity. Accordingly, the judgment of the district court dismissing claims against Chief Miller is affirmed.

V. *CONCLUSION*

The judgment of the district court with respect to the Fourth Amendment unreasonable seizure claim under 42 U.S.C. § 1983 against Officer Turek and the City of Lago Vista is reversed. All claims against Officer Turek for unreasonable seizure under the Fourth Amendment are reinstated. The claim under § 1983 against the City of Lago Vista for unconstitutional activity pursuant to official policy or custom as it relates to the alleged unreasonable seizure by Officer Turek is reinstated. The judgment of the district court dismissing all claims against Chief Miller is affirmed. The judgment of the district court is otherwise affirmed.

AFFIRMED IN PART; REVERSED IN PART; AND REMANDED.

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

[Filed February 13, 1999]

No. A- 97 CA 679 SS

GAIL ATWATER, Individually; MICHAEL HASS, M.D., As Next Friend of ANYA SAVANNAH HAAS and MACKINLEY XAVIER HAAS,
Plaintiffs,

v.

CITY OF LAGO VISTA, BART TUREK, and FRANK MILLER,
Defendants.

ORDER

BE IT REMEMBERED that the Court held a hearing in the above-styled case on the 26th day of January 1998, at which all parties were present through representation of counsel. The Court heard arguments on Defendants' Rule 12(b)(6) Motion to Dismiss or, in the Alternative, Rule 56

Motion for Summary Judgement [#19], Plaintiffs' Objections to and Motion to Strike Portions of the Affidavit of Frank Miller [#28], and Plaintiffs' Cross-Motion for Partial Summary Judgment and Response to City of Lago Vista Defendants' Motion to Dismiss or in the Alternative for Summary Judgment [#31].

As announced in open court, the plaintiff's claims are meritless. In fact, this case is one of a series of meritless lawsuits against the City of Lago Vista, Bart Turek, and Frank Miller, several of which allege class actions although they all arise from unique individual claims. Because the Court finds the defendants are entitled to judgment as a matter of law and no material issue of fact remains, the Court grants summary judgment to the defendants on all claims for the reasons discussed below. *See* FED. R. CIV. P. 56(c). For purposes of summary judgment, the Court considers the evidence of the plaintiffs, the nonmovants, as true and draws all justifiable inferences in their favor. *See Anderson v. Liberty Lobby, Inc.*, 106 S. Ct. 2505, 2513 (1986).

I. Background

On March 26, 1997, Gail Atwater was driving her Dodge Ram pickup truck in a residential neighborhood in Lago Vista, Texas. Her four-year-old son Mackinley was seated in the middle of the front seat, and her six-year-old daughter Anya was seated on the passenger side, and both children as well as Atwater were not wearing seat belts. Atwater was stopped by Lago Vista police officer Bart Turek.

According to Atwater, Turek approached Atwater's car and yelled and stuck his finger in her face, yelling, "We've

met before!" and "You're going to jail!" Atwater then calmly asked Turek not to yell. Turek had, in fact, pulled over Atwater previously for failing to fasten her children in seat belts. Turek next allegedly called for back up and asked Atwater to see her driver's license and insurance information. Atwater responded that her license and insurance information were unavailable because they were in her purse, which had been stolen the day before. Turek laughed and told her he had heard that story "two hundred times."

Atwater further alleges this behavior frightened her children, who were upset and crying. Atwater asked Turek if she could take her children to her friend's house, which was approximately two houses from the location at which Turek stopped Atwater. Turek responded that Atwater was "not going anywhere" and that Atwater did not care about her children or else she "would have had them in seat belts."

After Atwater's friend came to the car and took Atwater's children to her house for safe keeping, Turek continued to "yell at" and "browbeat" Atwater, telling her she was going to jail. Turek then handcuffed Atwater and took her to jail, where she spent approximately one hour. Atwater's pickup truck was towed and impounded. The arrest report states Atwater was arrested for driving without her seat belt fastened, failing to fasten her children in seat belts, driving without a license, and failing to provide proof of insurance. Atwater offers no evidence that these asserted reasons are pretextual or that there is any other reason she was arrested.

Atwater asserts Turek did not inform her that she was under arrest, and he did not inform her of her *Miranda* rights. There is no evidence that Turek interrogated Atwater, either,

however. Furthermore, Atwater concedes that she and her children were not physically harmed in any way during the incident, either at the time of the stop, at the time of the handcuffing, during transportation to the jail, or during her stay at the jail. Atwater alleges she was cold while she was the in jail cell, but she admits that she did not inform anyone that she felt cold.[1]

Under Texas law, it is a misdemeanor for an adult to ride in the front seat of a motor vehicle without a seat belt, TEX. TRANSP. CODE ANN. § 545.413(a), and it is also a misdemeanor to permit a child under the age of fifteen years to ride in the front seat of a motor vehicle without a seat belt, *id.* § 545.413(b). A peace officer "may arrest without warrant a person found committing" either of these seat belt offenses.

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[1] "Cold" also describes how the undersigned felt while examining the plaintiffs' response to the defendants' motion for summary judgment, with which the plaintiffs offered Exhibit A, a one-inch thick copy of the entire regulations, policy, and procedure of the Lago Vista Police Department, without any indication of which portions of the policy were relevant. The plaintiffs offered no summary judgment evidence to support their factual allegations, and plaintiffs' counsel relied solely on the summary judgment evidence offered by the defendants. The undersigned was also chilled by the defendants' submission of complete condensed deposition as an exhibit to the summary judgment evidence and citation to another multipage exhibit without any hints on where to look. With the busy case load this and most courts encounter, it would be much more considerate of both parties to attach and cite to only the relevant pages (in normal-sized print rather than microscopic).

Id. § 543.001. Furthermore, it is a misdemeanor to fail to display a valid driver's license when requested to do so by a peace officer, *id.* § 521.025. Finally, a driver who cannot exhibit proof of financial responsibility is presumed to have committed a misdemeanor for violation of the motor vehicle liability insurance requirement. *See id.*§§ 601.051, 601.053, 601.191.

The plaintiffs nevertheless filed suit August 8, 1997 in the 98th Judicial District of Travis County, Texas, and the defendants properly removed the case to this Court on September 12, 1997. The named plaintiffs in the case are Atwater and her husband, Michael Haas, as next friend of their children, Anya and Mackinley. The plaintiffs also make class action allegations, but they have waived any class action because they did not file a motion requesting class certification within thirty days as required by Local Rule CV-23.[2] The plaintiffs sue Bart Turek, Police Chief Frank Miller, and the

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[2] The class action allegations were frivolous because the alleged claims of deprivations of constitutional rights would not satisfy the typicality or commonality prerequisites. Similarly, the class members' causes of action could not conceivably satisfy the "common questions of law or fact predominating" requirement. *See* FED. R. CIV. P. 23; TEX R. CIV. P. 42. Even if 500 citizens of Lago Vista were injured because of the same unconstitutional policy of the City, it is inconceivable that the qualified immunity evaluations and the damage calculations for each of the class members would be the same or even similar. In short, it is inconceivable as a matter of common sense and as a matter of law that the claims asserted could possibly be amenable to a class action.

City of Lago Vista. The plaintiffs allege causes of action for (1) Deprivation of Constitutional Rights, (2) Excessive Use of Force, (3) False Imprisonment, (4) Inadequate Training, (5) Failure to Supervise, (6) Intentional Infliction of Emotional Distress, (7) Assault and Battery, (8) Grossly Negligent Hiring and Retention, (9) Conspiracy to Formulate and Enforce a Municipal Policy to Violate Constitutional Rights, and (10) Common Fund.

The defendants have filed a motion to dismiss pursuant to Rule 12(b)(6) for failure to state a claim, or in the alternative, for summary judgment. The plaintiffs have responded to the motion for summary judgment, but have not offered one iota of summary judgment evidence. As a result, there is no evidence whatsoever that would overcome qualified immunity on the constitutional claims and statutory immunity on the state-law claims.

II. Constitutional Claims

Qualified immunity shields state officials from suit for damages provided their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known. *See Anderson v. Creighton,* 107 S. Ct. 3034 (1987); *Harlow v. Fitzgerald,* 102 S. Ct. 2727 (1982). To determine whether the defendants are entitled to qualified immunity, the Court must engage in a two-part inquiry. First, the Court must determine whether the plaintiff has alleged a violation of a clearly established constitutional or statutory right. *See Ganther v. Ingle,* 75 F.3d 207, 210 (5th Cir.1996). If the law is clearly established, then the Court must decide whether the defendants' conduct was objectively reasonable in light of that law. *See id.* "The

contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right." *Anderson,* 107 S. Ct. at 3038-39.

The plaintiffs have failed to offer summary judgment evidence that could support either prong of the qualified immunity test. First, they have not provided evidence of any violation of a constitutional right, much less a violation of a clearly established constitutional right. Second, there is no evidence that any defendant acted in a manner that was not objectively reasonable in light of existing constitutional law.

The Court will not separately consider the plaintiffs' claim for an independent cause of action for "deprivation of constitutional rights." This cause of action clearly fails to state a claim because it does not allege with any particularity what conduct violated what provision of the Constitution. The plaintiffs allege specific constitutional violations in their causes of action for excessive force, false imprisonment, inadequate training, and failure to supervise.

The only alleged "force" and "imprisonment" arose out of Turek's arrest of Atwater for the seat belt violations as clearly authorized by Texas law. Atwater admits she violated the law,[3] and she does not allege that she was harmed or

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[3] Atwater is barred from bringing any claims related to her conviction unless she can prove "that the conviction or sentence has been reversed on direct appeal, expunged by executive order, declared invalid by state tribunal authorized to make such determination, or called into question by a federal court's issuance of a writ of habeas corpus." *Heck v. Humphrey,* 114 S. Ct. 2364,

detained in any way inconsistent with the law. She alleges she was cold in her cell at the jail, but she does not allege that she informed anyone she was cold. There is no clearly established constitutional right to have the thermostat magically set at the right temperature for each detainee, and there are no allegations that anyone acted in any sort of unreasonable manner because Atwater did not even voice her complaint.

The plaintiffs note the irony that Atwater was not placed in a seat belt when she was placed in the squad car in handcuffs. This may be ironic, but it was not illegal because the law only requires fastened seat belts in the front seat; and it was clearly not unconstitutional because the plaintiff was in no way harmed by the situation.[4] In fact, had Turek placed Atwater in the car and placed a seat belt gingerly around her, plaintiffs' counsel would have undoubtedly added allegations of "excessive force" and "false imprisonment" for the brutal manner in which Atwater would have been handcuffed and restrained, immobile in the squad car, by the officer. Overall, it is unimaginable how any competent attorney could think the summary judgment record establishes any section 1983 claim for excessive force or false imprisonment.[5]

2372, (1994)

[4] The plaintiffs point out that this lack of a seat belt violated the Lago Vista Police Department's written policy, but that is merely a violation of police policy, not a violation of the Constitution or laws of the United States, as required for a violation of section 1983.

[5] It is disturbing that the plaintiffs' counsel blatantly mischaracterizes the case law of unconstitutional searches to

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suggest Turek's conduct was unconstitutional. First, the plaintiffs cite a case and argue it is on point because it deals with police conduct in "arresting and briefly detaining" a tourist who made an illegal left turn and failed to produce his license. Plaintiffs' Cross-Motion for Partial Summary Judgment and Response to City of Lago Vista Defendants' Motion to Dismiss or in the Alternative for Summary Judgment [#31], at 13 (citing *Kelly v. Foti*, 77 F. 3d 819, 821-22 (5th Cir. 1996)). The plaintiffs leave out the minor detail that the holding was based on the fact that the innocuous tourist in *Kelly* was then subject to strip searches and body cavity searches. The case is as similar to Atwater's as scotch whiskey is to apple juice:

> A New Orleans police officer stopped Kelly, a tourist in town for a convention, for making an illegal left turn. Kelly explained that she inadvertently had left her diver's license at her hotel, and the officer called for backup to administer a DWI test, which Kelly passed. The police brought Kelly to a holding facility after arresting her for making the illegal turn and driving without a license. Kelly called her sister in Baton Rouge and husband in Connecticut and asked them to post bond, but they failed to do so promptly. After Kelly had been at the holding facility between four and five hours, police shackled and handcuffed her and took her to a female detention facility, where they subjected her to a strip search and cavity search. The police ordered Kelly to strip, turn around, bend over, spread her buttocks, and cough. After Kelly dressed, police escorted her to another room, where they told her to strip again and sprayed

The claims against the City of Lago Vista and Chief Miller for inadequate training, negligent hiring and retention, and failure to supervise as constitutional violations hinge on the requirement that the alleged inadequate training and failure to supervise caused some constitutional violation committed by Turek. As discussed above, there is no evidence in the record that Turek infringed any constitutional rights through the use of excessive force, false imprisonment, or "deprivation of constitutional rights." Therefore, these derivative causes of action necessarily fail, as well.

Furthermore, the plaintiffs' allegations of a conspiracy to formulate and enforce a municipal policy to violate

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> disinfectant on her crotch, breasts, and head. They then took Kelly to a shower area, where she showered in view of other inmates, before locking her in a cell. Kelly's family bonded her out approximately eleven hours after the arrest.

Id. at 820. Contrary to the plaintiffs' representations, there is quite a difference between this humiliating series of strip searches and "arresting and briefly detaining."

Similarly, the plaintiffs cite dicta from *Watt v. City of Richardson Police Dep't*, 849 F.2d 195 (5th Cir. 1988), for the proposition that it was not even necessary to place Atwater in a cell following her arrest. The holding in *Watt*, however, also related to an illegal strip and visual body cavity search. *Id.* at 199. Therefore, *Watt* and *Kelly* are inapposite.

constitutional rights fails on several grounds. The elements of a conspiracy under section 1985(3), which is the only conceivable civil rights conspiracy the plaintiffs allege, are

> (1) a conspiracy of two or more persons; (2) for the purpose of depriving, either directly or indirectly, any person or class of persons equal protection of the laws, or of equal privileges and immunities under the laws; and (3) an act in furtherance of the conspiracy; (4) whereby a person is either injured in his person or property or deprived of any right or privilege of a citizen of the United States.

Word of Faith Outreach Ctr. Church, Inc. v. Sawyer, 90 F.3d 118, 124 (5th Cir. 1996) (citing *Deubert v. Gulf Fed. Sav. Bank,* 820 F.2d 754, 757 (5th Cir. 1987)). Furthermore, it is essential that such a claim "that the conspiracy be motivated by racial animus." *Id.* In this case, there are no allegations of animus, so the claim fails on that ground alone. But the plaintiffs have not even alleged a "conspiracy" because the parties allegedly involved in the conspiracy are all agents of the City of Lago Vista Police Department and therefore unable to conspire under the intracorporate conspiracy doctrine. *See Hilliard v. Ferguson,* 30 F.3d 649, 653 (5th Cir. 1994); *Thompson v. City of Galveston,* 979 F. Supp. 504, 511 (S.D. Tex. 1997). Finally, as discussed above, no person was injured or deprived of any constitutional right as a result of the allegations. In short, the constitutional conspiracy claim fails miserably.

Additionally, suits against the public officials in their official capacities are treated as claims against the

governmental entities the public officials represent. *See Kentucky v. Graham,* 105 S. Ct. 3099, 3105 (1985); *Baker v. Putnal,* 75 F.3d 190, 195 (5th Cir. 1996). Therefore, the Court treats the claims against Turek and Miller in their official capacities as claims against the City of Lago Vista. Section 1983 liability of a municipality "may not be imposed on a theory of respondeat superior for the actions of government employees." *See Johnson v. Moore,* 958 F.2d 92, 93 (5th Cir. 1992). "Local governing bodies may be liable under section 1983, however, where the alleged unconstitutional activity is inflicted pursuant to official policy." *Id.* The one thing the plaintiffs have proven in this case is a "policy or custom," but they have put the cart before the horse because they have failed to offer evidence of any unconstitutional activity, as discussed above.

III. State-Law Claims

Under the Texas Tort Claims Act, a governmental unit is protected by sovereign immunity from suit based on any torts unless the torts arise out of the operation of motor vehicles or the use of tangible personal property. TEX. CIV. PRAC. & REM. CODE ANN. § 101.021. In light of established Texas law, it is laughable to suggest that any of the alleged torts against Atwater arose out of the operation of Tureks's squad car, his handcuffs, his badge, his lucky four-leaf clover, or any other imaginable tangible property. *See DeLeaux v. Hamshire-Fannett Indep. Sch. Dist.,* 835 S.W.2d 49, 51 (Tex. 1992) (motor vehicle); *Kerrville State Hosp. v. Clark,* 923 S.W.2d 582, 585-86 (Tex. 1996) (tangible property); *Smith v. Tarrant County,* 946 S.W.2d 496, 501 (Tex. App.-Ft. Worth, writ requested) (tangible property). Furthermore, the protection of sovereign immunity extends to intentional torts

such as assault and battery and intentional infliction of emotional distress. TEX. CIV. PRAC. & REM. CODE ANN. § 101.057; *Gillum v. City of Kerrville,* 3 F.3d 117 (5th Cir. 1993). Therefore, the claims for intentional infliction of emotional distress, assault and battery, and grossly negligent hiring and retention are barred by sovereign immunity.

Needless to say, since the plaintiffs have not offered summary judgment evidence to support any of their causes of action and have waived their class action allegations, their "common fund" cause of action must be dismissed.

IV. Conclusion

This is a lawsuit that should have never been filed and was poorly litigated once it was. Suits such as this are bane of the American legal system.

In accordance with the foregoing, the Court enters the following orders:

IT IS ORDERED that the Defendants' Rule 12(b)(6) Motion for Summary Judgment [#19] is GRANTED;

IT IS FURTHER ORDERED that Plaintiffs' Objections to and Motion to Strike Portions of the Affidavit of Frank Miller [#28] are OVERRULED;

IT IS FURTHER ORDERED that Plaintiffs' Cross-Motion for Partial Summary Judgment [#31] is DENIED;

IT IS FURTHER ORDERED that Gail Atwater and Michael Haas as next friend for Anya Haas and Mackinley

Haas TAKE NOTHING against the City of Lago Vista, Bart Turek, and Frank Miller;

IT IS FURTHER ORDERED that all costs shall be TAXED to the plaintiffs, for which let execution lie; and

IT IS FINALLY ORDERED that all other pending motions are DISMISSED AS MOOT.

SIGNED on this the 12th day of February 1998.

/s/_____
SAM SPARKS
UNITED STATES DISTRICT JUDGE